87-1903

No. 87-——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FITGER BREWING COMPANY,
a Minnesota corporation,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

Petition For A Writ of Certiorari To The Court Of Appeals Of Minnesota

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QUESTIONS PRESENTED

1. When the record supports a jury's factual findings that a property owner reasonably relied on the State Highway Department's representations that it would be impractical for the property owner to install improvements necessary to continue the only economically viable use of the property because all of the State's plans for construction of a freeway required acquisition of all or a part of the property, that the public announcements of the imminent condemnation of the property adversely affected the property's use, that the property owner reasonably relied on a misrepresentation of the Highway Department relating to the availability of an early acquisition procedure, and that the State restricted the property owner in improving, developing, utilizing, or otherwise disposing of its property for over thirteen years, is the Minnesota Court of Appeals' conclusion that the State's conduct did not amount to a taking of property contrary to the protections afforded by the Fifth and Fourteenth Amendments to the Constitution?

2. Did the Minnesota Court of Appeals, in deciding that the State's actions could not constitute a taking in the absence of a physical or legal prevention of the owner's use of the property, fail to follow this Court's standards for determining whether a taking occurred within the meaning of the Fifth and Fourteenth Amendments to the Constitution?

3. Should this Court resolve the conflict among the State and Federal courts on the issue of what conduct by a governmental entity in anticipation of a public improvement amounts to a taking of property within the meaning of the Fifth and Fourteenth Amendments to the Constitution?

PARTIES

All parties to this Petition are listed in the caption. The Fitger Brewing Company has no parent companies, subsidiaries, or affiliates.

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IN THE

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No. 87—

FITGER BREWING COMPANY,
a Minnesota corporation,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

Petition For A Writ of Certiorari To The Court Of Appeals Of Minnesota

Petitioner Fitger Brewing Company prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Minnesota in this matter.

OPINIONS BELOW

The decision of the Minnesota Court of Appeals, from which certiorari is sought (Appendix A) is reported at 416 N.W.2d 200 (Minn. App. 1987). The Order of the Minnesota Supreme Court denying Petitioner's Petition for Review of Decision of Court of Appeals (Appendix B) is not officially published.

JURISDICTION

The Minnesota Court of Appeals' decision and judgment herein was rendered on December 8, 1987. The Minnesota Supreme Court's Order denying petitioner's timely Petition

for Review of Decision of Court of Appeals was entered on February 23, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in part:

> . . . nor shall private property be taken for public use without just compensation.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Facts Material to the Consideration of the Questions Presented.

The Fitger Brewing Company ("Fitger") is a closely-held Minnesota corporation that operated a small brewery[1] in Duluth, Minnesota for over 90 years prior to 1972. The geographic distribution of its product was limited to northern Minnesota and northern Wisconsin.

In the fall of 1969, the Minnesota Pollution Control Agency ("PCA") informed Fitger that it was necessary to abate the discharge of its waste water into Lake Superior, that Fitger would have to either construct its own industrial waste treatment facilities or direct the waste water into the

[1]The Fitger brewery had a maximum operating capacity of 150,000 barrels per year, however, production had never exceeded 100,000 barrels in any of the brewery's years of operation. In contrast, in Fitger's last year of operation, major national breweries were producing four to five million barrels of beer per year.

city sanitary sewer system, and that the PCA intended to use all available resources to obtain compliance with its requirements. During that same time period, the State Highway Department advised Fitger that it was considering freeway plans that would involve Fitger's property. Under pressure from the PCA, Fitger entered into a Stipulation with the PCA, agreeing to cease its discharge into Lake Superior by December 31, 1970, or be subjected to a forced closing by the PCA. In the meantime, in November of 1970, the Highway Department advised Fitger, and publicly announced through newspaper articles, that its new freeway plans would require the condemnation of Fitger's property. These public announcements adversely affected Fitger's business, since Fitger's distributors turned to other more secure brands of beer for distribution.

While the Highway Department's plans were being finalized, Fitger obtained extensions of its Stipulation with the PCA, and the final extension allowed by the PCA required compliance by September 30, 1972. Fitger President John Ferris met with Highway Department officials in July of 1972, and was advised that all plans under consideration required the taking of the Fitger property. Ferris requested these advices in writing; however, it was not until September 26, 1972, just four days before the PCA's deadline for Fitger to either install the pollution abatement facilities or cease operations, that the Minnesota Highway Commissioner sent a letter to Ferris, which stated, in pertinent part:

> As we all know, it appears that it would be impractical for you to install pollution abatement facilities in view of the planning currently in process regarding the possible extension of I-35 within the City of Duluth.

> We can inform you that in all of the plans now under consideration for the extension of I-35, some part or all of the Fitger Brewing Company property would have to be acquired. I am sure that you are aware that the Federal regulations governing our operation do not permit us to make an acquisition or, indeed, begin the process until the final alignment of the highway is determined.

The letter also contained a paragraph that first expressed the hope that the information in the letter would help Fitger in its corporate planning, and then stated a disclaimer expressing the "possibility" that the freeway alignment could be changed or abandoned in the future.[2]

In reliance on the representations contained in that letter and previous representations from the Highway Department officials, Fitger terminated its brewery operations on September 30, 1972, and awaited the property's impendant condemnation. Contrary to the representations in the letter, federal regulations in effect at that time did permit the acquisition of the property as a hardship case, and the State of Minnesota and the Federal Highway Administration had approved many such hardship applications prior to September 1972.

After Fitger terminated its brewing operations, its property remained idle, producing only a very minimal income from the rental of a small portion of the brewery property. The property was subjected to various acts of vandalism resulting in the breaking and boarding of windows, and a

[2]Even a change in the freeway alignment would have had the same impact on the Fitger property, since any alignment would have required eliminating the railroad access to Fitger's property, which was used for the shipment of grain to the brewery and was essential to the brewery's efficient operation as designed.

substantial depreciation in value. Because of the well-known intended condemnation of the property, Fitger was not only unable to continue its business, but was restricted in its ability to improve, develop, utilize or otherwise dispose of its property. Furthermore, Fitger continued to incur expenses for maintenance and utility costs, as well as for property taxes, the accumulation of which would have subjected Fitger's property to forfeiture to the State, had Fitger not annually applied for and obtained orders from the local State District Court deferring the payment of those taxes in anticipation of the State's condemnation of the property.

During this time, Fitger persisted in attempts to have the State appraise its property and commence condemnation proceedings, all to no avail. However, consistent with its expressed intentions to acquire the property, the State deliberately acted to preclude any enhancement of the Fitger property well after the brewery closed. In 1974, the State opposed Fitger's petition to the city to vacate a street easement on Fitger's property, and as late as December 26, 1975, the State requested Fitger to oppose the entry of its property onto the National Register of Historic Places, and indicated its own intention to oppose that entry, all for the reasons that the State's freeway plans required the acquisition of Fitger's property. The State prepared a Draft Section 4(f) Statement and Historic and Cultural Preservation Report, which was approved on February 4, 1976, and which documented that there were "no feasible and prudent alternatives" to the taking of the Fitger property.

In September of 1976, four years after Fitger terminated its operations, the State documented a change in the freeway alignment that avoided the Fitger property entirely, but still required elimination of railroad access to the Fitger

property. The Final Environmental Impact Statement for the new alignment was approved on October 14, 1977. As a result of the five-year delay between the termination of the brewery's operations and this ultimate change in freeway alignments, all of Fitger's key brewery operational employees were no longer available, property taxes had accrued to a substantial amount, and the property had deteriorated and was in need of substantial repair. All this combined with the need to install pollution abatement facilities and other capital improvements that were previously contemplated, as well as the loss of railroad access, rendered reopening of the brewery operations a practical impossibility.

Fitger eventually sold its property in 1983 for $700,000.00 to a developer, who after a $12 million investment, converted the property to a hotel-shopping mall complex.

B. The Proceedings Below.

In January of 1978, Fitger commenced its action for inverse condemnation against the State, claiming that the totality of the conduct of the State, through the Highway Department and the PCA, forced Fitger to terminate its brewing operations on September 30, 1972, effectively rendering the Fitger property valueless for the purpose for which it was intended, and amounting to an effective taking of the Fitger property as of that date, for which Fitger is entitled to just compensation under the United States and Minnesota Constitutions. Fitger claimed that it was entitled to recover the fair market value of its property as of September 30, 1972, as well as reimbursement for the costs of maintaining the property until it was sold in 1983.

The case came to trial on October 29, 1986, and con-

tinued until November 19, 1986, when the jury returned its answers to the special interrogatories submitted to it by the trial court. By their verdict based on all the evidence presented at trial, the jury found as follows:

1. That prior to closing down on September 30, 1972, the Fitger Brewing Company reasonably relied on the representations of the State, through its Highway Department and its employees, that all the plans for the construction of Interstate 35 required the acquisition of all or a part of Fitger's property.

2. That before September 30, 1972, Fitger's business was adversely affected as a result of public announcements and other publicity, generated by the State that the route for Interstate 35 would require the taking of Fitger's property.

3. That Fitger reasonably relied on the State's representation that it would be impractical for Fitger to install pollution abatement facilities because all the State's Interstate 35 plans would require the acquisition of some or all of Fitger's property.

4. That prior to closing down on September 30, 1972, the State misrepresented to Fitger that federal regulations governing the State did not permit it to "make an acquisition or indeed begin the process until the final alignment of the highway was determined."

5. That Fitger Brewing Company reasonably relied on that misrepresentation in its corporate planning.

6. That by its acts or conduct, the State restricted Fitger Brewing Company in improving, developing, utilizing, or otherwise disposing of its property between the date of the State's public announcement in November 1970 and December 1983, when the property was sold.

7. That the fair market value of the Fitger Brewing Company brewery property on September 30, 1972 was $1,250,000.00.

8. That the amount of $812,797.00 would reasonably compensate Fitger Brewing Company for all of the necessary expenses it incurred to maintain its property from September 30, 1972 until the property was sold on December 19, 1983.

By Order dated November 21, 1987 (Appendix F), the trial court adopted the jury's factual findings, and on the basis of those factual findings, concluded that a taking of the Fitger property occurred by way of an inverse condemnation on or about September 30, 1972. By further Order dated February 26, 1987 (Appendix E), the trial court determined that Fitger was entitled to judgment exclusive of interest in the amount of $1,087,833.00, after deducting the amount of income Fitger received for the property, which included the $700,000.00 proceeds of the sale of the property in December of 1983. By Order of May 22, 1987 (Appendix D), the trial court awarded interest, costs and disbursements amounting to over four and one-half million dollars, which were added to the principal amount of $1,087,833.00, and Judgment (Appendix C) was entered for the total amount on that same date.

The State appealed, and the Minnesota Court of Appeals reversed, declining any deference to the trial court's findings and conclusions. In determining whether a taking occurred, the Court of Appeals focused on whether the State abused its eminent domain powers, rather than on the actual impact of the State's actions and conduct on Fitger's property rights. The Court of Appeals further ignored the

jury's findings of the State's deliberate misrepresentations and Fitger's reliance thereon in making its corporate decision to close as well as the undisputed evidence of the State's efforts to preclude any enhancement of the Fitger property well after the brewery closed, and concluded that the trial court erred in finding that the State's actions constituted a taking of the Fitger property in the absence of a physical or legal prevention of the use of the property or an unequivocal inducement of Fitger's corporate decision to accept cessation of operations pursuant to the PCA closure order.

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioner's contention that the State's conduct amounted to a taking of its property within the meaning of the Fifth Amendment to the United States Constitution as applied to the states by the Due Process Clause of the Fourteenth Amendment was first alleged in the petitioner's Amended Complaint (Appendix G). This contention was asserted in every one of petitioner's briefs and memoranda addressing the merits of the case both at the trial and appellate levels. This was the conclusive issue in this case for both the trial court and the Minnesota Court of Appeals.

REASONS FOR GRANTING THE PETITION

Introduction

The Fifth Amendment to the United States Constitution was adopted to quiet the concern that without some declaration of rights, there would be no protection against governmental interference with property rights that were among the inalienable rights identified in the Declaration of Inde-

pendence. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 324 (1893).

The context of anticipated public improvements and governmental activity as it relates to the rights of the owners of property in the vicinity of these public improvements provides the backdrop for a great number of occurrences in which the true force and effect of the Fifth Amendment's protections against governmental interference with property rights are called into question. This is such a case. After an opportunity to hear fourteen days of testimony and review 120 trial exhibits, the jury found that Fitger reasonably relied on the State Highway Department's representations that it would be impractical to install improvements necessary to continue the only economically viable use of the property since all of the State's freeway plans required acquisition of all or a part of Fitger's property. The jury also found that the State's public announcements of the imminent condemnation of Fitger's property adversely affected the property's use. The jury further found that the State misrepresented facts concerning the availability of an early acquisition procedure and that Fitger reasonably relied on that misrepresentation in its corporate planning. Finally, the jury found that the State restricted Fitger in improving, developing, utilizing, or otherwise disposing of its property for over thirteen years. Based on these findings, and based on its own observations of all of the evidence including undisputed facts, the trial court concluded that the State's conduct amounted to a taking of Fitger's property for which Fitger was constitutionally entitled to just compensation.

The Minnesota Court of Appeals found that the jury's findings were supported by the evidence, but concluded that

the State's conduct did not amount to a taking. In reaching this conclusion, the Minnesota Court of Appeals, contrary to some state and federal courts, and consistent with others, delineated state conduct that does and does not constitute a taking of private property. The line drawn by the Minnesota Court of Appeals is inconsistent with this Court's interpretation of the protections afforded by the Just Compensation Clause of the Fifth Amendment.

The facts and circumstances of this case, and the law established by this Court's interpretation of the Fifth Amendment's protections, as applied to those facts and circumstances, establishes that Fitger's property was taken by the State of Minnesota. The Minnesota Court of Appeals' denial of Fitger's right to just compensation for that taking must be reversed.

I.

Under the Facts and Circumstances of this Case, the Minnesota Court of Appeals' Conclusion that the State's Conduct did not Constitute a Taking of Property is Contrary to the Protections Afforded by the Fifth and Fourteenth Amendments to the Constitution.

The exercise of "fairness and justice" governs the enforcement of the Fifth Amendment's protection against governmental taking of private property without just compensation. *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Although no "set formula" has been developed for the application of "fairness and justice" in this context, *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978), and indeed, it has been conceded that such an application has only been made on an ad hoc

basis, *id.*, several factors of significance have been identified, to-wit: (1) the economic impact of the governmental action on the property owner; (2) the extent to which the governmental action interferes with the property owner's reasonable investment-backed expectations; and (3) the character of the governmental action. *Id.*

In *Kaiser Aetna*, the Court concluded that the conduct of governmental officials "can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over management of the land-owner's property." 444 U.S. at 179. Similarly, representations by a state that create expectations sufficient to allow the state to effectively deprive a property owner of rights inherent in the property ownership require compensation for that deprivation.

Here, the State's public announcements created the expectations of Fitger and the public that that Fitger property would be acquired for the freeway construction. In addition, rather than a simple silence or refusal to advise Fitger in any way, the State, with the knowledge that Fitger faced a forced shutdown of its operation by the PCA in the absence of a substantial investment in pollution abatement facilities, recommended that Fitger should not make such an investment in light of the State's intention to acquire the property. The State even went so far as to deceive Fitger into believing that there was no available remedy for its dilemma under federal regulations, when in fact the opposite was true. By virtue of its conduct, representations, and misrepresentations, the State coerced Fitger to abandon the only economically viable use of the property. The State then prevented Fitger from improving, developing,

utilizing, or otherwise disposing of its property for thirteen years, as evidenced by its active opposition to any enhancement of the property and its continued reinforcement of its intention to acquire the property, during which time the Fitger property sat vacant and idle, producing no income, subjected to acts of vandalism, incurring maintenance costs and an accrual of property taxes that threatened to force the property into forfeiture to the State.

In spite of all of these facts, as found by the jury,[3] the Minnesota Court of Appeals concluded that the State's actions did not constitute a taking of the Fitger property. The Minnesota Court of Appeals completely ignored the jury's finding of the State's misrepresentation and Fitger's reliance thereon in making its corporate decision to close. The Minnesota Court of Appeals also failed to acknowledge the undisputed evidence of the State's continuing efforts to preclude any enhancement of the Fitger property well after the brewery closed. The Court of Appeals also did not address the prejudicial impact of the State's delay in reaching an ultimate decision on the freeway alignment on Fitger's property rights. This delay not only subjected the property to tax forfeiture, but rendered the reopening of the brewery a practical impossibility. Extraordinary delay in governmental decisionmaking is a determinative factor in addressing a taking claim. *See Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980).[4]

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[3]The Minnesota Court of Appeals did not find that any of the jury's findings were unsupported by the evidence. Therefore, there is no warrant for re-examining the jury's findings, *see Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1976); *City of Lincoln v. Power*, 151 U.S. 436, 437-38 (1894); U.S. Const., amend. VII, and they must be accepted as true.

[4]The greater the prejudicial impact of the delay on the property owner, the greater the significance of the delay in determining that a taking has occurred. As a further example of the prejudicial impact of the State's delay on Fitger, six of the thirteen shareholders of record at the time the brewery closed in 1972 have since died.

The failure of the Minnesota Court of Appeals to conclude that the impact of the State's conduct on Fitger's property amounted to a taking of that property plainly offends the notions of fairness and justice that govern the enforcement of the Fifth Amendment's protection of property rights. As the Court stated long ago, the extent to which those property rights are protected "constitute[s] one of the most certain tests of the character and value of the government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893). This commitment to the protection of property rights was recently confirmed in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. —, 96 L.Ed.2d 250 (1987), in which the Court stated: "[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." 96 L.Ed.2d at 268.

The Minnesota Court of Appeals unaccountably failed to grasp the significance and import of the totality of the jury's findings and the trial court's conclusions, which were consistent with the theory and other undisputed evidence of Fitger's claim that the agents of the State's Highway Department set out on a deliberate course, including misrepresentations, to influence Fitger's corporate planning with respect to the continued use of its property as an operating brewery. This deliberate course, as supported by undisputed facts ignored by the Court of Appeals, was motivated by the desire and intent to acquire the property without improvements and as a non-operating brewery, or to claim, as the State has, that the highest and best use of the property was not as a brewery. As the Court stated in

Boyd v. United States, 116 U.S. 616 (1886), this is the type of governmental conduct that a proper interpretation of the Fifth Amendment guards against:

> [I]llegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

116 U.S. at 635. In the instant case, rather than acting as the guardian of private property rights, the Minnesota Court of Appeals has perpetuated their infringement.

The Minnesota Court of Appeals clearly breached the duty imposed on it by the Fifth Amendment. The only way to rectify this substantial injustice to Fitger is a reversal of the Minnesota Court of Appeals' decision. We urge the Court to so rule.

II.

The Minnesota Court of Appeals Failed to Follow this Court's Standards for Determining Whether a Taking Occurred Within the Meaning of the Fifth and Fourteenth Amendments to the Constitution.

The Court of Appeals concluded that the State's actions could not constitute a taking of Fitger's property "where

the State did not physically or legally prevent the owner's use of the property . . . ." (Appendix A, p. A-20). This conclusion is directly contrary to the pronouncements of this Court, which has expressly declined to "embrace the proposition that a 'taking' can never occur unless the government has transferred physical control over a portion of a parcel." *Penn Central Transportation, supra,* 438 U.S. at 122 n. 25.

Neither physical intrusion upon the premises nor acquisition of a legal interest in the property are prerequisites to a finding of a constitutional taking. *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 14 (1984). Rather, "a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment." *Id.* Thus, governmental conduct that prevents the best use of the property in question, *Agins v. Tiburon,* 447 U.S. 255, 262 (1980) (citing *United States v. Causby,* 328 U.S. 256, 262 & n. 7 (1946), or extinguishes a fundamental attribute of ownership, *Agins, supra,* 447 U.S. at 262 (citing *Kaiser Aetna v. United States, supra,* 444 U.S. at 179-80)), can amount to a taking of property, even in the absence of a physical intrusion onto the property or an absolute legal prevention of its use.

As the Court stated long ago, and recently repeated:

> It would be a very serious and unsatisfactory result if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.

Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1872) (emphasis original), *quoted in First English Church, supra*, 482 U.S.—, 96 L.Ed.2d at 265.[5]

All this, of course, is not to say that governmental entities are prohibited from interfering with private property rights in any way, but merely that when such interference, whether or not by a physical intrusion or legal prevention of use, amounts to a taking of property, the "constitutional obligation to pay just compensation" is necessarily implicated. *First English Church, supra*, 482 U.S. at —, 96 L.Ed.2d at 264 (*quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

In reaching its erroneous conclusion, the Minnesota Court of Appeals unduly focused on the propriety of the conduct of the State rather than focusing on the impact of the State's conduct on Fitger's property rights. Consideration of the propriety of a state's conduct has greater significance in a regulatory takings case involving an exercise of the state's police power than in an eminent domain case such as the case at bar, in which it is generally conceded that taking property for highway construction is for the public use. Moreover, even in the regulatory takings cases, the legitimacy of the state's action has no bearing on whether there has been a taking if there has been a denial of the property owner's economically viable use of the property. *See Nollan v. California Coastal Commission*, 483 U.S. —, 97 L.Ed.2d 677, 687 (1987); *Keystone Coal Association*

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[5]Although the *First English Church* case involved a regulatory taking, it would be a minimal extension of the reasoning of that decision to the non-regulatory context of the instant case to reach the conclusion that physicial and legal prevention of an owner's use of property are not absolute prerequisites to a finding of a taking of property within the meaning of the Fifth Amendment.

v. DeBenedictis, 480 U.S. —, 95 L.Ed.2d 472, 488 (1987); *Agins v. Tiburon, supra*, 447 U.S. at 260. The determination of whether there has been such a denial must be addressed from the perspective of the owner's loss of property rights. *See United States v. Causby, supra*, 328 U.S. at 261 ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken."); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (". . . the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking").

The Minnesota Court of Appeals erroneously focused on whether the State's conduct absolutely prohibited Fitger's use of the property, rather than on the impact of the State's conduct on the value of Fitger's property.[6] The standards established by this Court demonstrate that all that is required for the finding of a taking within the meaning of the Fifth Amendment, is "a radical curtailment" of Fitger's freedom to make use of or ability to derive income from its property, *Kirby Forest Industries, Inc. v. United States, supra*, 467 U.S. at 14, or a severe interference with Fitger's reasonable investment backed expectations. *Id.; Kaiser Aetna v. United States, supra*, 444 U.S. at 175; *Penn Central Transportation Co. v. United States, supra*, 438 U.S. at 124.[7]

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[6]As one authority noted: "[A] taking occurs . . . when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed." L. Tribe, *American Constitutional Law* 460 (1978)) (footnotes omitted).

[7]The Minnesota Court of Appeals conceded that "the state's preparatory steps for a taking . . . resulted in damage to [Fitger] who abandoned investments needed to preserve the property . . . ." (Appendix A, p. A-13).

Had the Minnesota Court of Appeals properly applied the standards established by this Court for determining whether the State's conduct had effected a taking of Fitger's property, the trial court's judgment in favor of Fitger would have been affirmed. The Court of Appeals' failure to follow this Court's teachings compels a reversal of its decision.

III.

This Court Should Resolve the Conflict Among State and Federal Courts on the Issue of What Conduct by a Governmental Entity in Anticipation of a Public Improvement Amounts to a Taking of Property Within the Meaning of the Fifth and Fourteenth Amendments to the Constitution.

The Minnesota Court of Appeals noted an apparent split of authority among other jurisdictions on the issue of when or whether a proposed condemnation and taking can rise to the level of a taking of property for which just compensation must be paid. The courts nationwide seem to be in general agreement with the proposition that mere plotting and planning "without more" does not amount to a taking. The critical issue causing the division among the state courts and some of the federal circuit courts is what conduct is sufficient to be "more" than mere plotting and planning to qualify the result of the conduct as a taking within the meaning of the Fifth Amendment. *Compare Conroy-Prugh Glass Co. v. Commonwealth*, 321 A.2d 598 (Pa. 1974) (taking found when state's public announcements that highway extension would require taking of owner's property caused property's income production to decline to extent that income was insufficient to pay property taxes, subjecting property to potential forfeiture to state); *In re Cornell*

Industrial Electric, 19 Pa. Cmwlth. 599, 338 A.2d 752 (1975) (de facto taking found when property owner's president was first advised that company's property was shown in proposed urban redevelopment plans to be acquired in future, redevelopment authority's actions were consistent with future acquisition of property, there was attendant media coverage of project, property required maintenance expense but was unable to generate income, property remained vacant and subject to theft and vandalism for four years, during which time there was no offer to purchase property nor a declaration filed); *Textron v. Wood,* 167 Conn. 334, 355 A.2d 307 (1974) (taking found when state highway department advised property owner that they would need to acquire property for highway construction and when statements and actions by state severely curtailed property owner's options with respect to development or disposition of the property, leading to conclusion that state's conduct substantially interfered with and lessened property owner's right to use and enjoy property); *Ventures in Property I v. City of Wichita,* 225 Kan. 698, 594 P.2d 671 (1979) (taking found when property was in proposed highway corridor and development of property was restricted pending final decision on location of highway);[8] *Roth v. State Highway Commission of Missouri,* 688 S.W.2d 775 (Mo.App. 1984) (taking found when evidence adduced at trial would have permitted a jury finding that highway commission's tactics, including "aggravated delay" in passage of seven years from announcement of condemnation of property for freeway

[8]*But see Lone Star Industries, Inc. v. Secretary of Kansas Department of Transportation,* 234 Kan. 121, 671 P. 2d 511 (1983) (no taking by virtue of plotting and planning of interstate highway which proposed acquisition of unspecified portion of property owner's property in absence of legal restriction on property owner's use of property).

until commencement of condemnation action, failure to employ available methods to expedite compensation to property owner, and other "untoward activity," prevented property owner from developing property); *and In re Virginia Park*, 328 N.W.2d 602 (Mich.App. 1982) (taking found on basis of claim that city excluded property from urban renewal project with intention of formally taking property at a subsequent date and at a lesser value, and conduct of city representatives caused decline in property's income production); *with City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895 (1971) (no taking found when property owner was advised it would have to vacate property as part of city urban renewal plan, property owner relocated, redevelopment project caused property value to decline and made property unsaleable, and condemnation proceedings were not commenced until nearly four years after property owner relocated; court held that there could be no de facto taking in the absence of physical invasion or direct legal restraint on property's use); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 109 Cal. Rptr. 799, 514 P.2d 111 (1973) (no taking found when property owner was denied a building permit on ground that location of building was same as proposed street extension); *Josh Cabaret, Inc. v. Department of Transportation*, 256 Ga. 749, 353 S.E.2d 346 (1987) (no taking found when department of transportation informed property owner that proposed highway construction would require removal, but not within three months and after notification of exact deadline for removal, property owner removed two months later, and highway project was subsequently abandoned; Georgia Supreme Court concluded in a 4-3 decision that removal prior to notification of removal

deadline was voluntary); *Kingston East Realty Co. v. State,* 133 N.J. Super. 234, 336 A.2d 40 (1975) (no taking found when state filed freeway alignment map showing property within freeway alignment, state acquired a nearby parcel, and there was no evidence of state's bad faith or knowing unlawful conduct in causing delay by refusing to abandon any long-range plan for eventual acquisition of property for proposed freeway);[9] *City of Chicago v. Loitz,* 61 Ill.2d 92, 329 N.E.2d 208 (1975) (no taking found when plan for realignment and reconstruction of streets resulted in negotiation for purchase of gas station's property, gasoline supplier refused to supply gas to porperty owner because of proposed street realignment project, buildings were vandalized and evenually ordered to be demolished, and project was thereafter abandoned and city refused to purchase property as agreed); *Sproul Homes of Nevada v. State,* 611 P.2d 620 (Nev. 1980) (no taking found on basis of public announcements of location of expressway through property in absence of legal or physical obstacles to use of property, and no allegations of undue or unreasonable delay or bad faith or oppressive conduct by state); *and Howell Plaza, Inc. v. State Highway Commission,* 92 Wis.2d 74, 284 N.W.2d 887 (1979) (no taking based on claim of inability to develop property found when public announcements stated that proposed freeway would pass through property, freeway corridor was subsequently approved, and state highway commissioner acquired several other parcels in

[9]*But see Washington Market Enterprises, Inc. v. City of Trenton,* 68 N.J. 107, 343 A. 2d 408 (1975) (taking found when city declared that area including property in question was subject to redevelopment project, city commenced acquiring properties while continually making announcements of plans for area resulting in decrease in property owner's rentals from property to extent that owner had to sell property to meet taxes because of inability to afford cost of upkeep, and city thereafter abandoned project).

freeway corridor as hardship acquisitions, but no steps were actually taken to develop property); *and compare Richmond Elks Hall Association v. Richmond Development Agency,* 561 F.2d 1327 (9th Cir. 1977) (taking found when city redevelopment agency advised owner of commercial building that building would be acquired as part of urban renewal program, resulting in: vacation of building by commercial tenants; inability to sell property; and limitation on use of property, and five years later, agency advised property owner that it would not be acquiring property); *and Thomas W. Garland, Inc. v. City of St. Louis,* 596 F.2d 784 (8th Cir.) *cert. denied,* 444 U.S. 899 (1979) (trial court's dismissal of lessee's inverse condemnation complaint on ground of failure to allege any physical entry or legal interference with the use or disposition of property reversed in light of evidence that city developer ordered lessee to vacate premises, and developer's agent acquired fee interest in lessee's property and other property in area and commenced demolition of buildings surrounding lessee's premises); *with Sayre v. City of Cleveland,* 493 F.2d 64 (6th Cir.), *cert. denied,* 419 U.S. 37 (1974) (no taking found when urban renewal activities of city caused decrease in property values, but city neither initiated eminent domain proceedings, evidenced any intent to begin eminent domain proceedings, nor physically invaded the property).

This split of authority demonstrates that the determination of Fitger's Fifth Amendment taking claim would vary from state to state or from federal circuit to federal circuit. This is clearly contrary to the "necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution." *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 347-48 (1816).

This case squarely presents a vehicle for resolution of this conflict among the state and federal courts. *See, e.g., Maryland v. Macon,* 472 U.S. 463, 465 (1985) (certiorari granted to resolve conflict among state courts on Fourth Amendment seizure issue); *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 9 (1984) (certiorari granted to resolve conflict in circuits regarding date on which taking in a condemnation proceeding is deemed to occur); *Minnesota v. Murphy,* 465 U.S. 420, 425 (1984) (certiorari granted to resolve conflict among state and federal courts on Fifth Amendment self-incrimination issue).

In light of the Court's decisions last term in cases presenting regulatory taking issues, *Nollan v. California Coastal Commission,* 483 U.S. —, 97 L.Ed.2d 677 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. —, 96 L.Ed.2d 250 (1987); *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. —, 94 L.Ed.2d 472 (1987), the time is ripe for addressing the issue of non-regulatory takings, an issue that has engendered disparate application of the Just Compensation Clause of the Fifth Amendment among the state and federal courts.

CONCLUSION

Governments must not be allowed to subvert the protections afforded to property owners by the Fifth Amendment by engaging in conduct just short of physical invasion or legal prevention of use, if the effect of that conduct is to so substantially interfere with the use of the property that it deprives the property owner of the only economically viable use of the property to the extent that the property's inability to generate income subjects the property to tax forfeiture, and the property owner is further unable to develop or dispose of the property. The Minnesota Court of Appeals should not be permitted to enable such a governmental subversion of a property owner's Fifth Amendment rights.

The Petition should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF MINNESOTA
IN COURT OF APPEALS

C4-87-1031
C8-87-1307

St. Louis County — Crippen, Judge

Fitger Brewing Company,

Respondent,

vs.

State of Minnesota, et al.,

Appellants.

SYLLABUS

Where a landowner faces a choice to either improve or close a brewery business, and chooses to close the business based on the state's representation the property likely would be acquired by the state for highway construction purposes, the state's actions do not constitute a taking in the absence of facts demonstrating that the state controlled or deliberately induced the owner's choice of action.

Reversed.

Heard, considered and decided by Wozniak, Presiding Judge, Crippen, Judge, and Stone, Judge.*

OPINION

CRIPPEN, Judge

The question presented in this case is whether the trial court erred in awarding damages to respondent Fitger Brewing Company in an inverse condemnation action, where the state never acquired or physically took the property. We reverse.

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*Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. 6, § 2.

FACTS

a. Background: events before 1970.

John Ferris owned and operated respondent Fitger Brewing Company in Duluth in a brewery building over a hundred years old located next to Lake Superior. The State of Minnesota, an appellant in this case, was planning a route for I-35 through Duluth beginning in the late 1950's. The state designed several plans for a segment of the interstate between 1958 and 1968. After all the potential plans were considered and rejected, in late 1969, the Minnesota Department of Transportation began exploring a new alignment for I-35 which would have required taking some of the Fitger facilities.

In September 1969, John Ferris was notified by the Minnesota Pollution Control Agency (PCA) that Fitger was to either install certain pollution control devices or terminate the brewery operation. Ferris corresponded with the PCA about the problem, and stated he intended to fund the improvements because Fitger did not have the capital to do so. The cost of the improvements was estimated to be $100,000.

b. Negotiations between Fitger and the state: 1970-1972.

In a January 12, 1970 letter, the PCA advised Fitger that construction or installation must be completed by May 26, 1973, and that the PCA would be issuing formal orders to compel compliance within that time unless the parties could agree to a voluntary stipulation. Ferris testified that he regarded that as a "pressure letter."

In December 1969, Ferris wrote to Les Miller, District Engineer for the Duluth District of the transportation de-

partment, to inquire about the proposed new plan for I-35 that would involve Fitger property. In the letter, Ferris said that Fitger was currently considering major pollution control expenditures and he expressed concern about possible highway plans that could affect his investment in improvements. In a letter dated December 18, 1969, Miller informed Ferris that the state was considering an alternate alignment for the highway that would involve some of the Fitger property. Ferris then met with Miller. Miller told him the state was considering the alternate alignment and Ferris explained that the affected property was integral to the brewery operation. Miller told Ferris a decision was expected by mid-summer.

On May 7, 1970, Fitger entered into a stipulation with the PCA, agreeing that Fitger would complete construction of the necessary facilities by December 31, 1970.

On September 25, 1970, Ferris sent a letter to Miller notifying him that Fitger, under pressure from the PCA, had agreed to correct its pollution problems by December 31, 1970; that Fitger had begun preliminary work on the improvements and that the brewery wanted assurance that the highway plans would not involve the plant property. Ferris asked to be advised when the transportation department expected plans to be finalized. It was evident to the state that Fitger preferred to make necessary improvements and remain open, rather than close down because of highway construction.

On November 9, 1970, the Duluth City Council gave preliminary approval to the state's highway plan. The next day Miller wrote to Ferris, stating that the state had abandoned one plan which involved the brewery's railroad right of way, and was now considering a proposal that would

require taking much of the brewery property. The department intended to hold a series of meetings with other groups in the city over the next month, and the letter stated no final date for decision was set, but Miller hoped it would be by about February 1, 1971.

At approximately the same time as the correspondence between Ferris and Miller, several newspaper articles were published locally on the proposed highway plans. An article in the Duluth News-Tribune on November 10, 1970, quoted Miller and another transportation department official stating that the newest development in plans "will mean 'taking' (condemning) everything on the south side of Superior Street from the Fitger Brewery to Eighth Avenue East." Ferris testified that there was a similar announcement in the Duluth Herald.

In late 1970, the city of Duluth requested that an independent consultant be hired to evaluate the need for and location of an interstate highway. The city hired the Eckbo firm as a consultant in December 1971, and it suspended decisions on I-35 pending Eckbo's report. During the course of the study, Eckbo held over 60 public hearings, most of which were attended by Ferris.

On November 13, 1970, Ferris sent a letter to John Badalich, Executive Director of the PCA, requesting an extension on his compliance date until July 30, 1971, which was granted. On July 6, 1971, Ferris requested another extension until September 30, 1972, because of the uncertainty in the highway plans. One day later, the assistant commissioner of transportation submitted a letter, on behalf of Fitger, to the PCA, also asking for the extension. The PCA granted the extension, but advised Ferris that there would be no further extensions beyond September 1972.

On July 17, 1972, Ferris attended a meeting with various transportation department officials and staff. At the meeting Ferris expressed his concern about the progress of the road planning study and the impending September 30 PCA deadline. Ferris testified that he was told that all the plans under consideration involved taking the Fitger property. He informed everyone present of Fitger's dilemma. He was told that the state could not commence the process of condemnation until they had approval of the project, and that any current appraisal would be scrapped because the property would have to be reappraised at the time of condemnation. Ferris testified there was no consensus at the meeting that it would be impractical to install the pollution control improvements.

The next day the Governor of Minnesota called Ferris. Ferris testified that the Governor realized Fitger was being "squeezed" by two state agencies. Ferris expressed his concern that the property would be forced to shut down and later be appraised as a defunct plant that was closed for economic reasons rather than because of the situation with the state. He asked the Governor for a letter from the transportation commissioner verifying that any later appraisal would be as an operating brewery. Ferris testified that the Governor agreed, directing Peter Gove to handle it, on the condition that Ferris not "make a political football out of the Fitger's Brewery being closed down." Ferris testified that he called the following week and met with the Governor and contacted Gove about the letter. Gove said they were working on it and Ferris would hear from them shortly. Ferris testified that he called several times to remind Gove.

On September 5, 1972, Ferris wrote a follow-up letter to the Governor, requesting that the state immediately appraise the Fitger property for condemnation purposes. It

was evident to the state that Fitger was proceeding with a plan to close the brewery. Before receiving a response, Fitger held a stockholders' meeting. At the meeting, Ferris explained the situation and reported that the brewery had been promised a letter from the commissioner's office prior to September 30, which would state that all the proposed highway plans under consideration involved use of the brewery property and that installation of pollution devices was therefore impractical. Fitger's board unanimously adopted a resolution that the brewery close on September 30, subject to receipt of the commissioner's letter.

On September 26, 1972, Ray Lappegaard, Highway Commissioner, sent a letter to Ferris on the Governor's behalf. Lappegaard's letter stated in part:

> As we all know, it appears that it would be impractical for you to install pollution abatement facilities in view of the planning currently in process regarding the possible extension of I-35 within the City of Duluth.
>
> We can inform you that in all of the plans now under consideration for the extension of I-35, some part or all of the Fitger Brewing Company property would have to be acquired. I am sure you are aware that the federal regulations governing our operation do not permit us to make an acquisition or, indeed, begin the process until the final alignment of the highway is determined.
>
> * * *
>
> In addition, we must advise you that there is a possibility that I-35 may not be extended beyond Mesaba Avenue; the possibility of some other alignment of which we are unaware of at this time, other proposals from our consultants or other consultants, or the public, which may eliminate the necessity of taking the Fitger Brewing Company property.

Respondent contends that the state misrepresented the applicable federal regulations on the need to delay condemnation. At trial, respondent introduced as evidence a March 14, 1973 letter to Ray Lappegaard from the U.S. Department of Transportation explaining the state's limitations on making acquisitions. The letter listed alternatives available to the state:

> 1) *Total Takes* can be made following FHWA approval of the Location Study Report providing: a) the location is positively fixed, * * *
>
> 2) *Partial Takes* can be made following FHWA approval of the Design Study Report providing the NEP [EIS] procedures have been satisfactorily completed.
>
> 3) *Hardship Cases* involving both total and partial takes can be authorized at any time, even though the NEP Act procedures have not been completed.

In 1969, the federal highway agency adopted new regulations requiring a two phase hearing process prior to the development of a federal-state interstate project. States were thereafter required to hold a corridor hearing, a design hearing, and receive federal approval of both the corridor and design of the proposed interstate facility prior to receiving federal funding for the project.

c. Fitger closing.

On September 30, 1972, four days after Commissioner Lappegaard sent his letter describing future events, the Fitger Brewery closed. The property was idle for the following years but had a number of expenses. The jury found that expenses incurred to maintain the property totaled $812,797.

d. The final highway alignment and subsequent events.

On March 20, 1972, the Eckbo team reported its preferred alternative alignment, which would have required taking the Fitger property. The department of transportation held the first corridor hearing on the proposal on October 19, 1973. The proposal met with extensive opposition and several alternatives were proposed at the hearing.

In 1975, the mayor of Duluth appointed a citizens committee to try to reach consensus on the project. The committee had two primary concerns: protection of public access to Lake Superior and preservation of various historic buildings. After extensive public hearings, on April 1, 1976, the committee recommended an alternative route which did not require the use of the Fitger property. This was eventually approved, and acquisition procedures began in February 1978. Fitger's railroad access was acquired by the state. Fitger appealed the commissioner's award of $65,000 on the grounds it was insufficient, and the state appealed it as excessive. That action is pending before the trial court.

In 1974, the state opposed Fitger's petition to the city to vacate a street easement on Fitger's property, because the state believed that the property would be used for I-35. In 1975, the state asked Fitger to oppose its property's inclusion on the National Register of Historic Places, because the state needed the property for the highway.

Fitger brought the current action in January 1978, in St. Louis County district court.

The Fitger property was sold to a private developer for $700,000 in 1983.

e. The trial.

The trial court submitted special interrogatories to the

jury on the taking issue. Answering the interrogatories submitted, the jury found that (1) Fitger's business was adversely affected by the publicity about the highway plans; (2) Fitger reasonably relied on the state's representations that all of the proposed plans involved acquiring the property, and that it would therefore be impractical to install the pollution abatement equipment; and (3) the state "restricted" Fitger in improving or disposing of the business. Based on the jury's answers, the court found that a taking of Fitger Brewing Company occurred by way of inverse condemnation on or about September 30, 1972.

The jury also found that the fair market value of the Fitger property on the date of closing was $1,250,000, and that $812,727 would compensate Fitger for expenses incurred between that date and the date of sale of the property. The court entered judgment for Fitger in the amount of $1.087,833, representing the damages established by the jury, less the income derived by Fitger ($974,964) after September 30, 1972.[1]

At the trial the state raised several arguments: (1) as a matter of law the state's planning, design, and precondemnation activities did not constitute a taking for which respondents were entitled to compensation; (2) respondent improperly brought an action for damages rather than seeking a writ of mandamus for condemnation proceedings; and (3) respondent's claim for damages from the state was barred by sovereign immunity. The state also objected that the trial court erred in barring opinion testimony of the going concern value of the Fitger property by

[1]The trial judge decided to apply the "prudent investor" formula, not challenged in this appeal, to calculate interest on the award. After hearing the argument of the parties, the court ordered judgment for Fitger of $5,422,241 for damages and interest calculated since September 30, 1972; and $191,236.98 for costs and attorney fees.

the state's expert, and the trial court improperly submitted the taking issue, a question of law, to the jury. The same questions are raised on the state's appeal.

ISSUE

Did the state's actions, followed by the respondent's decision to close its brewery, constitute a taking for purposes of the constitutional requirement of compensation?

ANALYSIS

Whether a taking has occurred is a question of law the trial court must answer. *Alevizos v. Metropolitan Airports Commission,* 298 Minn. 471, 484, 216 N.W.2d 651, 660-61 (1974). This court on review need not defer to the trial court in reviewing questions of law, and therefore may review this issue de novo. *Alwes v. Hartford Life & Accident Insurance Co.,* 372 N.W.2d 376, 378 (Minn. Ct. App. 1985).

Generally a suit in inverse condemnation seeks to recover the value of property which has been taken in fact by the governmental defendant although no formal exercise of the power of eminent domain has been attempted by the government. *Alevizos,* 298 Minn. at 477, 216 N.W.2d at 657. *Alevizos* established the two-part test for a property owner seeking compensation for damages caused by governmental action. The owner must be able to show first,

> a direct and substantial invasion of his property rights of such a magnitude he is deprived of the practical enjoyment of the property

and second,

> that such invasion results in a definite and measurable diminution of the market value of the property.

Id. at 487, 216 N.W.2d at 662. Such a finding would constitute a "taking" in the constitutional sense.

In this case, the state did not physically take or use the Fitger Brewery property in the construction of interstate highway 35-E. Even without a physical taking, however, the state can be ordered to institute condemnation proceedings and compensate the owner, if the state's actions damage property in such a way as to constitute a taking. *Thomsen v. State,* 284 Minn. 468, 471, 170 N.W.2d 575, 578 (1969). The dispute here is whether the state's preparatory steps for a taking which was later abandoned, but which resulted in damage to the owner who abandoned investments needed to preserve the property, constitutes a taking.

The state contends that the well-established rule in the majority of states is that a *proposed* condemnation and taking does not rise to the level of a compensable taking, if the state does not actually take or use the property. Only two Minnesota cases raise this theory. In *Spaeth v. City of Plymouth,* the supreme court stated in dicta that generally, "a landowner has no action against a government body for mere plotting or planning, without more, in anticipation of taking land." *Spaeth v. City of Plymouth,* 344 N.W.2d 815, 820 (Minn. 1984).

In *Orfield v. Housing & Redevelopment Authority of St. Paul,* 305 Minn. 336, 232 N.W.2d 923 (1975), an apartment building suffered physical deterioration and declined in value after the surrounding neighborhood was declared an urban renewal area. The owner brought suit to recover the loss in value, claiming it resulted from the blight caused by the neighborhood designation. The supreme court held that

> economic loss caused by the altered character of a neighborhood due to normal activities in connection with an urban renewal project, without more, does not constitute a de facto taking of the property in a constitutional sense.

Orfield, 305 Minn. at 341, 232 N.W.2d at 927 (1975).

In a New York appellate decision cited in *Spaeth*, a city redevelopment project was formed and began notifying property owners, including plaintiff, that their property would be taken by eminent domain. *City of Buffalo v. Clement Co.*, 28 N.Y.2d at 255-58, 269 N.E.2d at 903-05, 321 N.Y.S.2d at 357-59 (1971). After the city advised plaintiff several times, over a period of two to three years, that his premises would have to be vacated by a certain deadline, plaintiff gradually relocated his large printing company. One month before the final deadline he had moved out completely. Properties in the area suffered vandalism and declined in value. The New York court held there had been no de facto taking of Clement's property, despite the fact that the property had become unusable, and noted that the condemnation was only one of three reasons motivating the move. The court distinguished between a de facto taking, in which the condemnor physically takes the property or legally interferes with the owner's power of disposition of the property, and condemnation blight, which it said affects only the impact of the government's acts upon the valuation of the condemned property in the subsequent de jure proceeding. *Id.*

Appellants argue that property is not taken when the owner's loss of the property results from its exercise of choice. They argue the state is required to compensate the

owner only if the property is lost due to the events the state controls. The policy underlying this argument is that the power to use eminent domain is a legislative function, and allowing individual property owners to determine what property the state "takes" usurps this legislative power. *See Kelmar Co. v. District Court of Fourth Judical District*, 269 Minn. 137, 141, 130 N.W.2d 228, 231 (1964).

Conversely, respondent argues there was a substantial and unreasonable invasion and taking of its property because of the following factors: (1) the state's long-standing plan to take the Fitger property; (2) the openness and publicity surrounding the plan; (3) the state's confirmation in 1972 that all of the proposed options would involve taking the property; and (4) the state's confirmation that it would be impractical to install the pollution abatement facilities. Fitger contends these actions were tantamount to an agreement with the owner of the Fitger property that the closing would be considered a consequence of a taking, not of the financial status of the brewery.

A number of cases from other jurisdictions suggest support for Fitger's argument. *See, e.g. Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977) (taking occurred where agency announced proposed condemnation, notified owner it would acquire property, and property value declined greatly); *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977) (taking occurred where Congress passed plan for building public square on property and plan was publicized, owner could no longer sell property and was prevented from demolishing or using property for new building, and government assured owner property would be acquired and discussed trading property with owner); *Washington Market Enter-*

prises, Inc. v. City of Trenton, 68 N.J. 107, 343 A.2d 408 (1975) (taking occurred when city abandoned redevelopment project after threat of condemnation had effect of blighting the area and made property unusable and unsaleable); *Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal. Rptr. 1, 500 P.2d 1345 (1972) (taking of rental income occurred where precondemnation announcements, specifically aimed at plaintiff's property, prevented owner from using property profitably); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970) (taking occurred where landowner advised that seashore legislation to be enacted would require taking his land, owner was prevented from subdividing or developing land, and government warned potential buyers of land of likely condemnation and warned owner it might be fraudulent to sell it); *Foster v. City of Detroit*, 254 F. Supp. 655 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968) (taking occurred where city selected older area for slum clearance and public housing, commenced condemnation proceedings, and substantially contributed to aggravated deterioration and decline in property values in area by discouraging inprovements, and by other conduct).

Here, the trial court resolved the taking question based on facts found by a jury.[2] These critical questions were submitted to the jury:

---

[2]As stated earlier, the trial court must, as a matter of law, determine whether a taking has occurred. *Alevizos*, 298 Minn. at 485, 216 N.W.2d at 660. If the court concludes there has been a taking, damages must then be determined as a matter of fact. *Thomsen*, 284 Minn. at 475, 170 N.W.2d at 580. Where the court's conclusion on taking requires resolution of disputed underlying fact questions, the court may empower a jury to determine these facts. *Id.* at 475, 170 N.W.2d at 580-81.

> Before September 30, 1972, was Fitger's business adversely affected as a result of public announcements and other publicity, generated by the State that the route for Interstate 35 would require the taking of Fitger's property?
>
> Did Fitger's reasonably rely on the State's representation that it would be impractical for Fitger's to install pollution abatement facilities because all of the State's I-35 plans would require the acquisition of some or all of Fitger's property?
>
> Did the State by its acts or conduct restrict Fitger Brewing Company in improving, developing, utilizing, or otherwise disposing of its property between the date of its public announcement in November 1970 and December 1983, when the property was sold?

The jury answered these and other interrogatories in the affirmative.

The trial court's interrogatories reflect its conclusion as a matter of law that there was a de facto taking if the state's publicized planning "adversely affected" Fitger's business, if Fitger "reasonably rel[ied]" on the state's concurrence that Fitger improvements were impractical, and if Fitger's choice on the improvement issue was "restrict[ed]" by the state's actions. We conclude this determination of the law on a de facto taking was in error.

In *Orfield*, discussed above, the supreme court found that designation of an urban renewal area, followed by an owner's choice not to make property improvements, did not constitute a taking. Significantly, however, the court recognized that "abuse of the power of eminent domain * * * directed

against a particular parcel could constitute a de facto taking." *Orfield*, 305 Minn. at 342, 232 N.W.2d at 927. The court rejected the property owner's argument that a letter from the development authority was evidence of an abuse of the power of eminent domain. Rather, the letter "was nothing more than a good-faith response" to the owners' request that their property be taken, and "the letter promised nothing more than consideration of the request if funds became available." *Id.* In fact, the letter considered in *Orfield* strongly urged the owners to maintain their property so that it would not depreciate before an actual taking occurred. *Id.* at 338-39, 232 N.W.2d at 925.

Thus, under *Orfield*, the question is whether the state has abused its power of eminent domain. We know from *Orfield* that there is no such abuse if the state makes it clear to the owners there may be no taking, does not abuse its discretion by abandoning a plan to take, and urges the owners to make necessary property improvements.

In September 1972, Ferris asked for the state's confirmation that all proposed plans for the highway called for taking the Fitger property, and that it would be impractical to improve the property. He wanted assurances the Fitger property would be taken as a brewery, and that the brewery closing would not be treated as a consequence of general economic facts. The state responded with a last-minute letter that gave Ferris the assurances he wanted regarding the impracticality of improvements but left open the possibility that other plans could be formed in the future that would not require acquiring the Fitger property. Thus, the state made it clear in September 1970 that it might not take the Fitger property, and there is no evidence of bad faith in its decision not to take. Fitger president Ferris

evidently wanted assurances Fitger would be compensated for loss of a brewery operation, and he got no such assurance. Rather, the state made it evident the taking might not occur.

In *Orfield*, the public authority urged the owners to maintain their property. Here, the state said it appeared to be correct to consider that pollution control improvements would be impractical in view of planning for a possible highway project. We conclude this response of the state does not rise to the level of an abuse of power constituting a de facto taking.

Fitger's freedom of choice was not destroyed by the actions of the state. Fitger wanted assurances tantamount to an immediate condemnation, and it clearly did not get those assurances. While Fitger may have reasonably relied on the state's comments on the impracticality of improvements, its choice of action was not controlled or restrained by the state. *Cf. Foster*, 254 F. Supp. at 660-61 (where property improvements were necessary to avoid rapid deterioration, and city instructed owner it was not to improve property in anticipation of increased compensation, and court found the city encouraged decay and desertion of area). In *Foster*, and other cases cited by appellant, the public authority deliberately and unequivocally induced a decision to let property deteriorate. Here, the wishes of the state were unclear, and the state carefully noted the possibility that no taking would occur. On September 26, 1972, the Commissioner of Transportation noted that Fitger must be advised that "there is a possibility" highway construction would not occur past the Fitger property, and "the possibility of some other alignment of which we are unaware at this time" which would eliminate the need to take the

Fitger property. Four days later, despite this warning, Fitger closed its plant.

The jury found that actions of the state restricted Fitger's improvement plans. The record supports this finding, but does not show restrictions by the state constituting control or restraint of Fitger's use of the property, or even the unequivocal inducement by the state of a decision against improvement of the property.

We find no authority permitting us to expand the concept of de facto taking, suggested in *Orfield*, to a case where the landowner's freedom of choice on improvement is not substantially destroyed by state action. Absent such control over the owner's use of its property, we are dealing with normal "incidents of ownership." *Orfield*, 305 Minn. at 341, 232 N.W.2d at 927. *See Spaeth*, 344 N.W.2d at 821 (planning without taking an exercise of state police power); *Foster*, 254 F.Supp. at 662 (actions without taking a common burden of citizenship).

DECISION

The trial court erred in finding that the state's actions constituted a taking of the Fitger property, where the state did not physically or legally prevent the owner's use of the property or force its closing.

Reversed.

Dated: December 1, 1987.

/s/ Gary L. Crippen

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT
C4-87-1031 and C8-87-1307
Fitger Brewing Company,

Respondent,

vs.

State of Minnesota, et al.,

Appellants.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Fitger Brewing Company for further review be, and the same is, denied.

Dated: 2-23-88.

BY THE COURT:

/s/ PETER S. POPOVICH
Associate Justice

OFFICE OF
APPELLATE COURTS
FEB. 23, 1988
FILED

APPENDIX C

STATE OF MINNESOTA, COUNTY OF ST. LOUIS
DISTRICT COURT DIVISION I
SIXTH JUDICIAL DISTRICT

Fitger Brewing Company, a Minnesota Corporation,
Plaintiff,

vs.

State of Minnesota; and Warren Spannaus, its attorney general; and James Harrington, its commissioner et al,
Defendant.

JUDGMENT

142399

The above entitled matter came before the above named Court and jury on the 29, day of October, 1986. Upon conclusions thereof, the jury returned its answers to special interrogatories on the 19th day of November, 1986. The Court having reviewed the file, having considered factual and legal contentions of the parties, having considered answers made by the jury to the special interrogatories, having reviewed pertinent legal authorities, and deeming itself advised in the premises, did on the 21st day of November, 1986, duly make and file its Order for Judgment herein with a stay of entry thereon for a period of thirty (30) days.

The matter again came before the Court on the 19th day of March, 1987, on motions of the parties concerning the costs, attorneys fees and interest pursuant to orders of the above named Court dated November 21, 1986 and

February 26, 1987. William O'Brien and Richard Leighton appeared on behalf of Fitgers and Lloyd Moosbrugger and Arthur Anselmo appeared on behalf of the State.

The matter again came before the Court on the 23rd day of April, 1987, upon motions of the parties. Defendant moved for an order granting: 1. Judgment notwithstanding the verdict, or, 2. a new trial on all issues. The plaintiff opposed the motions in all respects. The Court having reviewed the file, having considered oral and written arguments of counsel, having reviewed and analyzed conculations set forth by counsel, having reviewed affidavits concerning the matters involved in the motions, having reviewed pertinent legal authorities, and deeming itself advised in the premises, did on the 22nd day of May, 1987, duly make and file its Order herein, denying motions of defendant.

Now, pursuant to additional Order filed on May 22, 1987, concerning costs, attorneys fees and interest, IT IS HEREBY ADJUDGED:

1. That Judgment is hereby entered in favor of the Plaintiff and against the Defendant in the sum of Five Million Four Hundred Twenty-two Thousand Two Hundred Forty-one and no/100ths Dollars (5,422,241.00), representing the amount of damages as determined by the jury plus interest on said damages calculated from the date of taking, September 30, 1972. Said calculations are as on March 19, 1987.

2. That costs and attorneys fees in the total sum of One Hundred Ninety-one Thousand Two Hundred Thirty-six and 98/100ths Dollars ($191,236.98), be entered in favor of the Plaintiff and against the Defendant, said amount consisting of the following individual items:

A. Attorney Sidney Kaner, $10,805.88

B. Attorney William P. O'Brien, et al $124,877.04

C. John Hoff, et al (Professional Appraisal Services), $31,383.28

D. Robert Mustari, et al (Professional Appraisal Services), $22,970.78

E. Robert Ostern (Professional Consultation), $1,200.00

Witness the Honorable Charles T. Barnes, Judge of the District Court Division I, aforesaid, at Duluth, Minnesota, this 22nd day of May, 1987.

JOSEPH M. LASKY,
Court Administrator
By /s/ NANCY L. ODDEN
Deputy

Filed in my office at ——o'clock —M, May —, 1987.
Court Administrator, Joseph M. Lasky, Deputy.
/s/ Illegible, Deputy

APPENDIX D

STATE OF MINNESOTA — DISTRICT COURT
County of St. Louis — Sixth Judicial District

Fitger Brewing Company, a Minnesota Corporation,
Plaintiff,

vs.

State of Minnesota; and Warren Spannaus, its attorney general; and James Harrington, its commissioner et al,
Defendant.

ORDER AND MEMORANDUM
File No. 142399

The above-captioned matter came before the undersigned on motions of the parties on March 19, 1987, concerning the costs, attorneys fees and interest, pursuant to orders of this Court dated November 21, 1986 and February 26, 1987.

APPEARANCES

For Fitgers, William O'Brien and Richard Leighton, Attorneys at Law, 1000 First Bank Place, Duluth, MN

For the State, Lloyd Moosbrugger, Assistant Attorney General, 515 Transportation Building, St. Paul, MN 55155;

Arthur Anselmo, Assistant Attorney General, 1123 Mesaba Avenue, Duluth, MN

Subsequent to the oral argument the parties were permitted to furnish amended calculations and additional memorandum.

The Court having reviewed the file, having considered oral and written arguments of counsel, having reviewed and analyzed the calculations set forth by counsel, having reviewed affidavits concerning the matters involved in the motions, having reviewed pertinent legal authorities, and deeming itself advised in the premises, now makes its:

ORDER

IT IS ORDERED that judgment in favor of the plaintiff and against the defendant be entered in the total amount of $5,422,241, representing the amount of damages as determined by the jury plus interest on said damages calculated from the date of taking, September 30, 1972. Said calculations are as of March 19, 1987.

IT IS FURTHER ORDERED that costs and attorneys fees in the total amount of $191,236.98, be entered in favor of the plaintiff and against the defendant, said amount consisting of the following individual items:

A. Attorney Sidney Kaner, $10,805.88

B. Attorney William P. O'Brien, et al, $124,877.04

C. John Hoff, et al (Professional Appraisal Services), $31,383.28

D. Robert Mustari, et al (Professional Appraisal Services) $22,970.78

E. Robert Ostern (Professional Consultation), $1,200.00

Let judgment be entered accordingly,

Dated: 5-22-87.

BY THE COURT,

By /s/ Charles T. Barnes, Judge Thereof

MEMORANDUM

The Court has carefully considered the contentions of the parties relating to interest. The case of *Spannaus vs. Carney*, 309 NW 2d 775, lends support to the "prudent investor" approach. Interest is part of the just compensation.

Starting with that theory, the question then becomes what would the prudent investor have realized from the use of money from and after September 30, 1972 up to March 19, 1987? The Court has adopted the calculations as prepared by certified public accountant Robert Unzen with respect to that topic. That amounts to a very substantial sum of interest, but that is understandable in view of the extraordinary length of time which is involved in this litigation.

Turning to the question of costs, disbursements and attorneys fees, the Court has concluded that the affidavits and supporting documents furnished by the plaintiff in that regard are also accurate and appropriate. The unusual circumstances surrounding this litigation, the extreme length of time which has been required, and the unique quality of this entire proceeding result in very substantial commitment of time and resources by the attorneys, the experts whom they have employed, and for that matter by the plaintiff corporation itself.

The Court does not find in the submissions of the plaintiff anything that is unreasonable or that was unnecessary and accordingly has concluded that the plaintiff is entitled to the full taxation of costs, disbursements, and attorneys fees.

CTB

APPENDIX E

STATE OF MINNESOTA — DISTRICT COURT
County of St. Louis — Sixth Judicial District

Fitger Brewing Company, a Minnesota Corporation,
Plaintiff,

vs.

State of Minnesota; and Warren Spannaus, its attorney general; and James Harrington, its commissioner et al,
Defendant.

ORDER AND MEMORANDUM
File No. 142399

The above-captioned matter came before the undersigned and a jury for trial in October and November 1986 and was the subject of an order of this Court dated November 21, 1986.

Pursuant to that order counsel submitted to the Court their theories and calculations as to the amounts, if any, to be awarded to the plaintiff by reason of the answers made to special interrogatories. Counsel have complied with the request of the Court and have supplied their theories and calculations.

APPEARANCES

For Fitger Brewing Company, William O'Brien, Attorney at Law, and Richard Leighton, Attorney at Law, 1000 First Bank Place, Duluth, MN.

For the State of Minnesota, Arthur Anselmo, Special Assistant, Attorney General, 1123 Mesaba Avenue, Duluth, MN;

And, Lloyd J. Moosbrugger, Assistant Attorney General, 515 Transportation Building, St. Paul, MN 55155.

The Court having reviewed the file, having reviewed the submissions of counsel following the trial, having reviewed pertinent legal authorities, and deeming itself advised in the premises, now makes its:

ORDER

IT IS ORDERED that the plaintiff have judgment against the defendant in the sum of $1,087,833.00, representing the damages as established by the jury, less the income derived by the plaintiff in the sum of $974,964, from and after September 30, 1972.

IT IS FURTHER ORDERED that the parties supply to the Court their theories and calculations relating to interest which may be applicable, and with respect to costs and disbursements, and that such theories and calculations thereon be submitted to the Court not later than March 13, 1987.

IT IS FURTHER ORDERED that counsel appear before the undersigned on Thursday, March 19, 1987 at 11:00 A.M. for the purpose of oral argument with regard to interest, costs and disbursements, and any other appropriate issues.

Dated: 2-26-87.

BY THE COURT,

By /s/ Charles T. Barnes, Judge Thereof

Memorandum attached.

Filed in my office at — o'clock — M, Feb. 26, 1987., Court Administrator, Joseph M. Lasky, Deputy.

MEMORANDUM

The attached order reflects the Court's view that the plaintiff is entitled to payment not only for the overall value of the brewery, but also for the expenses the plaintiff incurred while maintaining the premises from and after the date of the inverse condemnation.

Those two figures totalled $2,062,797.00.

From that gross amount the Court has deducted the income derived by the plaintiff during that same period of time in the total amount of $974,964.00.

The difference between those figures is $1,087,833.00, which the Court believes is the appropriate amount to be awarded to the plaintiff.

Disputes may exist with respect to interest, and costs and disbursements. Accordingly, an opportunity to address those issues is now established.

There may be other issues to consider, and an opportunity for discussion is provided in the order.

CTB

APPENDIX F

STATE OF MINNESOTA — DISTRICT COURT
County of St. Louis — Sixth Judicial District

Fitger Brewing Company, a Minnesota Corporation,
Plaintiff,

vs.

State of Minnesota; and Warren Spannaus, its attorney general; and James Harrington, its commissioner et al,
Defendant.

ORDER
File No. 142399

The above-captioned matter came before the undersigned and a jury for trial in Duluth, Minnesota starting October 29, 1986 and being completed by submission to the jury of special interrogatories on November 18, 1986.

On November 19, 1986 the jury, on a 5/6ths verdict, made answers to interrogatories as appears by the originals on file herein.

APPEARANCES

For Fitger Brewing Company, William O'Brien, Attorney at Law, and Richard Leighton, Attorney at Law, 1000 First Bank Place, Duluth, MN.

For the State of Minnesota, Arthur Anselmo, Special Assistant, Attorney General, 1123 Mesaba Avenue, Duluth, MN;

And, Lloyd J. Moosbrugger, Assistant Attorney General, 515 Transportation Building, St. Paul, MN 55155.

The Court having reviewed the file, having considered factual and legal contentions of the parties, having considered answers made by the jury to the special interrogatories, having reviewed pertinent legal authorities, and deeming itself advised in the premises now makes its:

ORDER

IT IS ORDERED that the Court adopt the finding of the jury that a taking of property of Fitger Brewing Company occurred by way of an inverse condemnation on or about September 30, 1972.

IT IS FURTHER ORDERED that both parties provide to the Court a written synopsis of what each claims to be the appropriate and accurate amount of deductions which the Court must apply to the damages as found by the jury, and the Court requires that such resumes by counsel be provided not later than December 3, 1986.

IT IS FURTHER ORDERED that after the resumes are supplied, with copies to opposing counsel, that the Court will make a further order concerning this matter.

IT IS FURTHER ORDERED that entry of judgment herein be stayed for a period of 30 days following the further order of this Court.

IT IS SO ORDERED,

BY THE COURT,

By /s/ Charles T. Barnes, Judge Thereof

Dated: 11-21-86.

Filed in my office at — o'clock —M, Nov. 21, 1986, Court Administrator, Joseph M. Lasky, Deputy.

/s/ Illegible, Deputy

APPENDIX G

STATE OF MINNESOTA — DISTRICT COURT
County of St. Louis — Sixth Judicial District

Fitger Brewing Company, a Minnesota Corporation,
Plaintiff,

vs.

State of Minnesota,
Defendant.

AMENDED COMPLAINT

Plaintiff, Fitger Brewing Company (Fitger) for its Amended Complaint against Defendant, State of Minnesota (State), alleges and states as follows:

1. That at all times herein material, Fitger was and is a Minnesota corporation, which for 91 years was engaged in the business of brewing and bottling beer at its place of business located at 600 East Superior Street in the City of Duluth, St. Louis County, Minnesota; and in the operation of that business, Fitger owned, maintained, and operated its plant and other facilities upon that property owned by Fitger in fee, and which is more particularly described as shown in Exhibit A, attached hereto and incorporated herein.

2. That beginning in 1969, Fitger was advised by the Minnesota Department of Highways, through a series of written and oral communications, that the proposed route

of Federal Interstate Highway 35 (I-35) would run through a portion of Fitger's property, requiring the acquisition of all or a part of Fitger's property.

3. That public announcements by the State at public meetings and in the Duluth news media confirmed that the route for I-35 would require the condemnation of Fitger's property.

4. That as a result of the public announcements at public meetings and in the Duluth news media indicating the intent of the State to ultimately condemn and acquire Fitger's property, Fitger's distributors sought out other brands of beer for distribution in anticipation of that condemnation, and, consequently, Fitger's business substantially declined.

5. That in 1971, the State engaged the firm of Eckbo, Dean, Austin & Williams to study and make recommendations with respect to the location of I-35, and their proposal for the location of I-35 also required the removal of Fitger's buildings and the condemnation of its property.

6. That in 1969, the Minnesota Pollution Control Agency (PCA) notified Fitger that it would have to construct waste disposal facilities as part of a pollution abatement project to eliminate Fitger's discharge of water into Lake Superior as part of its brewing operations by December 31, 1970, or be required to terminate its brewing operations.

7. That because of the announced plans to condemn Fitger's property for the construction of I-35, Fitger entered into an agreement with the PCA to extend the deadline for compliance with the pollution abatement requirements until June 30, 1971, which deadline was subsequently extended by agreement until September 30, 1972.

8. That the required pollution abatement project would have required Fitger to incur substantial investment in pollution abatement facilities.

9. That in 1971 and 1972, Fitger repeatedly requested the State to appraise its property, or otherwise commence condemnation proceedings in accordance with its declared intent to take Fitger's property for the construction of I-35.

10. That by letter dated September 26, 1972, a copy of which is attached as Exhibit B, just four days prior to the deadline for compliance with the PCA requirements for pollution abatement, the State, through its Commissioner of Highways, advised Fitger that it was aware that Fitger's agreement with the PCA required that Fitger install pollution abatement facilities by September 30, 1972, or Fitger's operation would be closed down on that date, and further advised "that it would be impractical for you to install pollution abatement facilities in view of the planning currently in process regarding the possible extension of I-35 within the City of Duluth," and "that in all of the plans now under construction for the extension of I-35 some or all of the Fitger Brewing Company property would have to be acquired," however, with respect to the actual acquisition of the Fitger property, the letter further advised: "I am sure you are aware that the federal regulations governing our operation do not permit us to make an acquisition or, indeed, begin the process until a final alignment of the highway is determined."

11. That in fact, federal regulations governing Defendant's operation did permit Defendant to acquire Fitger's property as a hardship case.

12. That because of the representations made by the Minnesota Department of Highways advising Fitger that

all or part of its property would be acquired prior to the construction of I-35, and because of the requirement of the PCA that Fitger complete an expensive pollution abatement project at its plant by December 30, 1972, or close down its plant, Fitger terminated its brewing operations on September 30, 1972.

13. That despite continued requests and applications by Fitger to the Minnesota Department of Highways to acquire Fitger's property under procedures for hardship cases, the State continued to deny that it had the authority to acquire Fitger's property as a hardship case, when in fact the Minnesota Department of Highways had such authority and exercised that authority to acquire more than 145 parcels of property prior to and after September 26, 1972 through the end of 1977.

14. That despite continued requests by Fitger to the Minnesota Department of Highways to acquire its property by instituting condemnation proceedings, the State continued to refuse to initiate such condemnation proceedings, and did not institute any such proceedings until March 30, 1979, when the State served Fitger with a Petition for the condemnation of only the rail access to Fitger's property.

15. That the rail access to Fitger's property was essential to Fitger's brewing operations such that the acquisition of the railroad access would effectively destroy Fitger's brewing business.

16. That the State of Minnesota has wrongfully omitted Fitger's property from its eminent domain proceedings for the condemnation of only the rail access to Fitger's property.

17. That Fitger has appealed from the Commissioners' award for the taking of that rail access to the St. Louis County District Court, on the ground that the "partial con-

demnation is insufficient and inadequate as having been commenced by the State of Minnesota instead of the inverse condemnation of the entire premises of Fitger Brewing Company as demanded by said Fitger Brewing Company in a separate action herein, that this proceeding is unconstitutional as depriving Fitger Brewing Company of its property without due process of law, and that the damages awarded are insufficient." That appeal is currently pending as Sixth Judicial District File No. 144287.

18. That after Fitger terminated its brewing operations on September 30, 1972, the property remained idle, producing no income, however, Fitger continued to incur expenses for its investment in the property, interest expenses, maintenance and utility costs, and property taxes, which accrued at an average rate of $24,000.00 per year, the accumulation of which would have subjected Fitger's property to forfeiture to the State of Minnesota for nonpayment of taxes in the absence of a deferment of the payment of those taxes by an Order of the St. Louis County District Court, in anticipation of the condemnation of Fitger's property by the State.

19. That after Fitger terminated its brewing operations, its property remained idle, and was subjected to various acts of vandalism resulting in the breaking and boarding of windows, and the property substantially depreciated in value; and further that, because of the intended condemnation of Fitger's property, Fitger was not only unable to continue its business, but was restricted in its ability to improve, develop, utilize, or otherwise dispose of its property.

20. That as a direct result of the State's conduct, by publicly announcing the anticipated condemnation of Fitger's property for the construction of I-35, by causing ex-

tensive publicizing in the Duluth news media of its proposed freeway route which would require the acquisition of Fitger's property, by directly advising Fitger of its intention to acquire all or part of Fitger's property for freeway construction, by requiring Fitger to make a substantial investment in pollution abatement facilities or close its brewing operation by September 30, 1972, in the face of the proposed condemnation of Fitger's property, by misrepresenting its authority with respect to its ability to acquire Fitger's property as a hardship case, and by its willful and wrongful delays in responding to Fitger's reasonable requests for a determination with respect to the acquisition of its property. Fitger was forced to terminate its operations on September 30, 1972, and Fitger's business was thus destroyed and Fitger was denied any and all reasonable use of its property on that date.

21. That by virtue of the State's above-described conduct, the State committed a *de facto* taking, or an inverse condemnation, of Fitger's property on September 30, 1972, for which Fitger is entitled to be compensated in accordance with the Fifth Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment thereto, and Article I, Section 13 of the Constitution of the State of Minnesota.

22. That by virtue of the condemnation of the railroad access to Fitger's property, the State has destroyed Fitger's business and deprived Fitger of all use of its property as a brewing operation, and Fitger is entitled to compensation for the taking of its property in accordance with the Fifth Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment thereto, and Article I, Section 13 of the Constitution of the State of Minnesota.

23. That as a direct result of the State's conduct described above, and as a direct result of the State's delay in instituting condemnation proceedings relating to Fitger's property, Fitger's property substantially declined in value, for which Fitger is entitled to compensation in accordance with the Fifth Amendment of the Constitution of the United States as applied to the States by the Fourteenth Amendment thereto, and Article I, Section 13 of the Constitution of the State of Minnesota.

WHEREFORE, Fitger alternatively prays for judgment against the State as follows:

1. Awarding damages in an amount in excess of $50,000.00 for the destruction of Fitger's business and the taking of Fitger's property on September 30, 1972, plus interest on the amount awarded accruing from September 30, 1972, until the time of the determination of the amount of damages at a rate to be determined by the Court, plus all taxes and assessments on the property that have been accrued since September 30, 1972, pursuant to Minn. Stat. § 117.135, and plus all of Fitger's reasonable attorneys' fees, appraisal and engineering fees, and expert witness fees incurred in bringing this action, pursuant to Minn. Stat. § 117.045; or

2. Issuing a Writ of Mandamus pursuant to Minn. Stat. Chapter 586, compelling the State to: (1) commence eminent domain proceedings for the condemnation of Fitger's property; (2) appraise that property as of September 30, 1972, for the purpose of determining the amount of loss and damages sustained by Fitger by virtue of the taking of its property on that date; (3) pay interest on the compensation award accruing from September 30, 1972, at a rate determined by the Courts; (4) pay all taxes and assessments

on Fitger's property that have accrued since September 30, 1972, pursuant to Minn. Stat. § 117.135; and (5) reimburse Fitger for all of its reasonable attorneys' fees, appraisal and engineering fees, and expert witness fees incurred in bring this action, pursuant to Minn. Stat. § 117.045 or

3. Awarding damages in an amount in excess of $50,000.00 for the destruction of Fitger's business and the deprivation of all of Fitger's use of its property as a brewing operation as valued as of September 30, 1972, by virtue of the condemnation of the railroad access to Fitger's property, plus interest on the amount awarded accruing from September 30, 1972, at a rate determined by the Court, plus all taxes and assessments on the property that have accrued since September 30, 1972 pursuant to Minn Stat. § 117.135, plus all of Fitger's reasonable attorneys' fees, appraisal and engineering fees, and expert witness fees incurred in bringing this action, pursuant to Minn. Stat. § 117.045; or

4. Issuing a Writ of Mandamus pursuant to Minn. Stat. Chapter 586, compelling the State to: (1) reopen the eminent domain proceeding for the condemnation of the railroad access to Fitger's property and amending that proceeding to include Fitger's property; (2) appraise that property as of September 30, 1972, for the purpose of determining the amount of loss and damage sustained by Fitger by virtue of the condemnation of the railroad access to Fitger's property; (3) pay interest on the compensation award accruing from September 30, 1972, at a rate determined by the Court; (4) pay all taxes and assessments on Fitger's property that have accrued since September 30, 1972, pursuant to Minn. Stat. § 117.135; and (5) reimburse Fitger for all of its reasonable attorneys' fees, appraisal and en-

gineering fees, and expert witness fees incurred in bringing this action, pursuant to Minn. Stat. § 117.045; or

5. Awarding damages in an amount in excess of $50,000.00 for the depreciation in value of Fitger's property since September 30, 1972, plus interest on that amount accruing from September 30, 1972 at a rate determined by the Court, plus payment of all taxes and assessments assessed on Fitger's property that have accrued since September 30, 1972, and that are based on an assessed value in excess of the value of Fitger's property as depreciated since September 30, 1972, pursuant to Minn. Stat. § 117.135, plus reimbursement of all of Fitger's reasonable attorneys' fees, appraisal and engineering fees, and expert witness fees incurred in bringing this action, pursuant to Minn. Stat. § 117.045; or

6. Issuing a Writ of Mandamus pursuant to Minn. Stat. Chapter 586, compelling the State to: (1) commence eminent domain proceedings for the depreciation of the value of Fitger's property since September 30, 1972; (2) appraise Fitger's property as of September 30, 1972, and determine the amount of loss and damage to that property by virtue of its depreciation since September 30, 1972; (3) pay interest on the compensation award accruing from September 30, 1972, at a rate determined by the Court; (4) pay all taxes and assessments on the property that have accrued on the property since September 30, 1972, and which are based on an assessed value in excess of the value of Fitger's property as depreciated since September 30, 1972, pursuant to Minn. Stat. § 117.135; and (5) reimburse Fitger for all of its reasonable attorneys' fees, appraisal and engineering fees, and expert witness fees, in-

curred in bringing this action, pursuant to Minn. Stat. § 117.045; or

7. To award such relief as the Court deems just, proper, and equitable.

HANFT, FRIDE, O'BRIEN,
HARRIES & BUJOLD, P.A.
By /s/ William P. O'Brien
and
By /s/ Richard J. Leighton
Attorneys for Plaintiff
1200 Alworth Building
Duluth, MN 55802
(612) 722-4766

"Exhibit A"

LEGAL DESCRIPTION OF FITGER PROPERTY

(Torrens Title)

Parcel #1

Lot One (1) "FITGERS ADDITION" to Duluth, according to the recorded plat thereof of record in the office of the Register of Deeds of said St. Louis County *EXCEPT* that part of FITGER'S ADDITION OF DULUTH adjoining Block 4 of PORTLAND DIVISION, both of said plats on file and of record in the office of the Register of Deeds and/or Registrar of Titles, County of St. Louis, State of Minnesota, more particularly described as follows:

Beginning at the Northwesterly corner of said FITGER'S ADDITION on the southerly line of Superior Street and being common with the Northeasterly corner of said Block 4, PORTLAND DIVISION, thence North 42°00′ East along the said southerly line of Superior Street a distance of 82.00 feet to a point; thence south 48°00′ East a distance of 95.00 feet to a point; thence south 39° 31′ West a distance of 46.17 feet to a point; thence south 37°13′10″ West a distance of 36.00 feet to the Southeasterly corner of said Block 4 of PORTLAND DIVISION; thence North 48°00′ West along the easterly line of said Block 4 of PORTLAND DIVISION a distance of 100.00 feet to the point of beginning.

Parcel #2

Beginning at a point on the southwesterly line of Lot One in Block four in that part of Duluth formerly called Portland, which point is one hundred feet southeasterly from the southeasterly line of Superior Street, as shown upon said plat, thence running along a line drawn from the last described point northeasterly at right angles to said southwesterly line of said lot one to a point, which point is the

intersection of the last described line with the northwesterly line of the right of way of the Duluth and Iron Range Railroad Company, as the said right of way is described and defined in that certain lease bearing date September 7, 1887, from the St. Paul and Duluth Railroad Company to said Duluth and Iron Range Railroad Company, recorded in Book E of Agreements on page 480, in said Register of Deeds Office; thence northeasterly along the northwesterly line of the said right of way to the Northeasterly line of Lot Nineteen in Block Three, according to said plat; thence northwesterly along said northeasterly line of said lot Nineteen to the center line of Superior Street, aforesaid; thence southwesterly along the center of said Superior Street one hundred ninety feet to a point of intersection with the extended southwesterly line of said lot one in said block four; thence southeasterly along said southwesterly line of said lot one a distance of one hundred forty feet to the place of beginning, except all that part of the lands above described which lie west of the westerly line of Washington Avenue as shown upon the plat of Duluth formerly called Portland, according to the recorded plat thereof.

STATE OF MINNESOTA
Department of Highways
St. Paul, Minn. 55101

September 26, 1972
Mr. J. A. Ferris
President
Fitger Brewing Company
600 East Superior Street
Duluth, Minnesota 55802

Dear Mr. Ferris:

I am writing in reply to your letter of September 5, 1972, addressed to Governor Wendell R. Anderson.

We are aware that the Minnesota Pollution Control Agency has granted the Fitger Brewing Company two extensions of its completion date for the installation of pollution abatement facilities. It is our further understanding that your stipulation agreement with PCA requires that the project be completed by September 30, 1972, or that the operation be closed down until you are in full compliance.

As we all know, it appears it would be impractical for you to install pollution abatement facilities in view of the planning currently in process regarding the possible extension of I-35 within the City of Duluth.

We can inform you that in all of the plans now under consideration for the extension of I-35, some part or all of the Fitger Brewing Company property would have to be acquired. I am sure you are aware that the federal regulations governing our operation do not permit us to make an acquisition or, indeed, begin the process until the final alignment of the highway is determined.

We are hopeful that this information will be of help to you at this time in aiding your own corporate planning. In addition, we must advise you that there is a possibility that I-35 may not be extended beyond Mesaba Avenue; the possibility of some other alignment of which we are unaware of at this time, other proposals from our consultants or other consultants, or the public, which may eliminate the necessity of taking the Fitger Brewing Company property.

The Highway Department and the Governor's office are very much aware of your difficult situation and we are hopeful that an alignment can be determined as soon as possible.

Sincerely,
/s/ Ray Lappegaard
Commissioner

Supreme Court, U.S.
FILED
JUN 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1903

IN THE

Supreme Court of the United States

October Term, 1987

FITGER BREWING COMPANY,
a Minnesota corporation,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the jury finds that the public planning activities mandated by federal law and undertaken by the State of Minnesota in planning a major interstate highway construction project have affected the value of property owned by the Fitger Brewing Co., did the Minnesota Court of Appeals err in finding that the State's planning activities did not constitute a taking under this Court's standards for determining whether a taking has occurred within the Fifth and Fourteenth Amendments of the U.S. Constitution?

2. Should this Court resolve a conflict among the states and federal courts regarding when government planning activities give rise to a constitutional taking where, even under the more stringent analysis of the minority jurisdictions, this case does not give rise to a taking?

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IN THE

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No. 87-1903

FITGER BREWING COMPANY,
a Minnesota corporation,

Petitioner,

v.

STATE OF MINNESOTA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, State of Minnesota, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Court of Appeals' opinion in this case. That opinion is reported at 416 N.W.2d 200 and is reproduced in Appendix A to the petition.

STATEMENT OF THE CASE

The State of Minnesota (State), in cooperation with the City of Duluth and the U.S. Department of Transportation, began planning for the development of federal Interstate Highway 35 (I-35) in Duluth, Minnesota, in the late 1950's.[1] (Tr. Ct. T. 980-81.) The planning of this controversial project has spanned 20 years. Throughout this litigation, the Petitioner, Fitger Brewing Co. (Fitger), has alleged that the effect of this planning process on its property constitutes a taking within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution.

Beginning in 1958 and continuing through 1970, the State of Minnesota examined three separate design proposals for I-35 in Duluth, Minnesota. (Tr. Ct. T. 980-1001.) Each of these proposals was presented to the citizens of Duluth for consideration and was rejected. (*Id.*) In November 1970, a design that would have required a taking of the Fitger Brewery was presented to the Duluth City Council for preliminary approval. Upon receipt of the City's preliminary approval, the State intended to hold extensive public hearings on the proposal prior to making a final decision on the highway's location. (Tr. Ct. T. 732-33.)

Simultaneously, between 1968 and 1970, the federal government adopted legislation and regulations compelling federal and state agencies to undertake extensive public planning prior to construction of major highway projects such as I-35.[2]

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[1] Unless otherwise noted, all factual references contained herein are to the Trial Court Transcript which has previously been certified and filed with the Clerk of the Minnesota Court of Appeals pursuant to Minn. R. Civ. App. P. 110.02, subd. 2.

[2] Section 4(f) of the Department of Transportation Act of 1966 as amended and section 18(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. § 139 formerly 49 U.S.C. § 1653(f)) required the

(Tr. Ct. T. 113-14 and 1081-94.) In response to increased planning requirements and to growing public concerns, the City of Duluth, in 1970, requested that an independent consultant be hired to evaluate the feasibility of the I-35 project. (Tr. Ct. T. 1001-02.) All State activity on I-35 was immediately suspended. In December 1971, the consultant firm of Eckbo, Dean, Austin, and Williams (Eckbo) was hired to undertake a comprehensive analysis of the I-35 project. (Tr. Ct. T. 1003-05.) The Eckbo study spanned two years and involved analysis of several designs within five separate corridors. (Tr. Ct. T. 1192-97.) Each corridor was sixty-eight city blocks in length and approximately one-half mile wide. (*Id.*) The Eckbo firm held over sixty public meetings on the I-35 project in Duluth, the majority of which were attended by Fitger President, John Ferris. (Tr. Ct. T. 161-62.)

The Fitger Company, prior to and during this planning process, operated its brewing facility in Duluth, Minnesota. In response to local rumors that the State was considering new plans for I-35, Fitger contacted the State in September, 1970 and requested that the State not take its property or that the State commit to completing a plan for I-35 on a date certain. (Tr. Ct. Exh. 15.) The State informed Fitger that the I-35 proposal then under consideration would require a taking of the Fitger property and that this plan was being advanced to the City of Duluth as a suggestion. (Tr. Ct. Exh. 16.) From

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preparation of a 4(f) statement analyzing the effect of highway construction projects on parklands and historic properties; the National Environmental Policy Act enacted in January, 1970 (42 U.S.C. § 4232) required the preparation of a detailed environmental impact statement prior to undertaking a major federally-funded highway construction project; and regulations of the Federal Highway Administration (FHWA) adopted in 1969 established a two-phased planning and public hearing process for federally-funded highway construction projects (FHWA, PPM 20-8, Tr. Ct. Exh. 51).

1970 on, Fitger made regular inquiries as to whether its property would be taken for the I-35 project. After the Eckbo firm was retained to do a feasibility study, Fitger was continually advised by Eckbo that some of the plans under consideration would require the Fitger property and some would not. (Tr. Ct. T. 1199-1201.)

Throughout the 1950's and 1960's, Fitger's sales were steadily declining. Fitger had insufficient capital to finance improvements, it was unable to acquire bank financing, and it was unable to pay its bills as they became due. (Tr. Ct. T. 97-98, 287, 307-08.)

As part of its manufacturing process, Fitger dumped 50,000 gallons of cooling waters and 37,000 gallons of processing waters containing industrial wastes into Lake Superior daily. (Tr. Ct. T. 1341-42.) As early as 1968, the Minnesota Pollution Control Agency had mandated that Fitger install pollution abatement equipment. But Fitger did not have sufficient working capital to do so. (Tr. Ct. Exh. 8.) The installation of abatement equipment, if it was to occur at all, had to be personally financed by Fitger President, John Ferris. (Tr. Ct. T. 307-08, 378.)

After receiving numerous extensions of time to meet State pollution standards, Fitger contacted the Minnesota Pollution Control Agency in July 1971 and volunteered to either abate pollution or terminate operations on September 30, 1972. (Tr. Ct. Exh. 24.) On September 5, 1972, Fitger contacted the Governor of Minnesota and requested that its property be condemned. (Tr. Ct. Exh. 28.) In response, the Minnesota Commissioner of Highways, on September 25, 1972, advised Fitger that all plans then under consideration would require taking some part of the Fitger property. (Tr. Ct. Exh. 30.) But the Commissioner also stated:

> . . . In addition, we must advise you that there is a possibility that I-35 may not be extended beyond Mesaba Avenue; the possibility of some other alignment of which we are unaware of at this time, other proposals from our consultants or other consultants, or the public, which may eliminate the necessity of taking the Fitger Brewing Company.

(Id.) Despite the State's continual advice that a taking of the Fitger property was not certain, Fitger closed its brewery on September 30, 1972. (Tr. Ct. T. 176-78.) On that date, the Eckbo firm was actively considering 25-30 designs, some of which would not have required a taking of the Fitger property. (Tr. Ct. T. 1195-97.)

On March 20, 1973, the Eckbo firm adopted a "preferred" alternative that would have required the taking of the Fitger property.[3] (Tr. Ct. T. 1197.) This alternative was incorporated into the State's draft environmental impact statement (EIS) which was released in October 1973. (Tr. Ct. T. 1194-98.) A corridor hearing addressing the preferred alternative was held in Duluth on October 19, 1973. (Tr. Ct. T. 1014.) The Eckbo preferred alternative met with strenuous public opposition. (Tr. Ct. T. 1201-02.) As a result, the State, the Federal Highway Administration and the City of Duluth undertook further studies of the I-35 project. (Tr. Ct. T. 1014-20, 1203.) It was not until April 1, 1976, that an alter-

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[3] The opinion of the Minnesota Court of Appeals incorrectly states that the Eckbo firm adopted its preferred alternative on March 20, 1972. This is an apparent clerical error. The uncontroverted testimony at trial was that the Eckbo preferred alternative was adopted on March 20, 1973. (Tr. Ct. T. 1197.) The 1973 date is also referenced in Respondent State of Minnesota's brief to the Minnesota Court of Appeals. The Minnesota Court of Appeals has been notified of this clerical error.

native for I-35 was approved by the City of Duluth. This alternative only required the taking of the Fitger rail access.[4] (Tr. Ct. T. 1023, 1206-07.) A final EIS for the project was approved by the FHWA in 1977. (Tr. Ct. T. 1030-31.) As of January 1, 1978, the State had not begun acquisition procedures or acquired a single piece of property for the I-35 project.

HISTORY OF THE LITIGATION

Fitger, on January 31, 1978, brought suit against the State of Minnesota, in Minnesota District Court, alleging that, by publicly announcing plans for I-35 which might have required the future condemnation of the Fitger property and by ordering Fitger to install pollution abatement equipment, the State had taken the Fitger property without just compensation in violation of the Minnesota Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution.

The case came on for trial by jury on October 29, 1986, and continued through November 19, 1986, when the jury returned answers to special interrogatories. The jury found that the Fitger business had been adversely affected by publicity of the I-35 planning process, that Fitger relied on the State's statement that it would appear to be impractical to install pollution abatement equipment, and that by these actions the State restricted Fitger's ability to develop its property.

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[4] On June 7, 1979, the State of Minnesota, in a separate action, instituted condemnation proceedings to acquire the Fitger rail access. This separate action is currently pending in Minnesota District Court. There was no evidence by either party at the trial of the inverse action concerning the taking of rail access. Claims relative to the rail access are being raised for the first time by Petitioner in its Petition for a Writ of Certiorari to this Court. (Petition at 4 n.2.)

The jury found damages to the Fitger property in the amount of $1,250,000. The trial court found that a taking of the Fitger property had occurred and ordered judgment in the amount of $1,087,833 plus interest calculated from September 30, 1972.

The State appealed from the judgment of the trial court to the Minnesota Court of Appeals.[5] The Minnesota Court of Appeals observed that, while a jury may be impaneled in an inverse condemnation action to determine issues of fact, the determination of whether the facts give rise to a constitutional taking is a legal determination to be made by the Court. (Petition, Appendix A.) The Minnesota Court of Appeals properly noted jurisdiction to review *de novo* questions of law and concluded that the activities undertaken by the State in planning I-35 did not give rise to a constitutional taking of the Fitger property. The Minnesota Supreme Court denied Fitger's Petition for Review of the Decision of the Court of Appeals on February 23, 1988. (Petition, Appendix B.)

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[5] The State raised four issues in its appeal to the Minnesota Court of Appeals. Because the Minnesota Court of Appeals determined, as a matter of law, that there had not been a constitutional taking of the Fitger property, the Court did not find it necessary to reach the three remaining issues raised by the State in its appeal.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because Petitioner has failed to show there are "special and important reasons" for this Court to grant discretionary review as required by Supreme Court Rule 17.

I. THE MINNESOTA COURT OF APPEALS DID NOT ERR IN DETERMINING THAT THE PLANNING ACTIVITIES OF THE STATE OF MINNESOTA UNDERTAKEN IN PLANNING A MAJOR INTERSTATE HIGHWAY DID NOT GIVE RISE TO A TAKING UNDER THIS COURT'S STANDARDS FOR DETERMINING WHETHER A TAKING HAS OCCURRED WITHIN THE MEANING OF THE FIFTH OR FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION.

The Minnesota Supreme Court has directly addressed when the actions of a government agency give rise to a constitutional taking in *Alevizos v. Metropolitan Airports Commission*, 298 Minn. 471, 216 N.W.2d 651 (1974). In *Alevizos* the Minnesota Supreme Court held a government's actions give rise to a taking when those actions result in a "direct and substantial invasion" of property rights to such a magnitude that the owner is "deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property." *Id.* at 487, 216 N.W.2d at 662. This standard is consistent with the taking standard of this Court and was applied by the Minnesota Court of Appeals in the present case. Petitioner Fitger does not directly contest the constitutionality of this standard. Rather, Fitger asks this Court to review the factual findings which compelled the Minnesota Court of Appeals to conclude that there was no constitutional taking of its prop-

erty and to grant review because the Minnesota Court of Appeals failed to properly apply this Court's standard for determining whether there has been a constitutional taking of its property.[6] The Minnesota Court of Appeals' decision is not, however, in conflict with any decision of this Court.

Fitger claims that the State has taken its property by proposing for public consideration highway construction plans which might have required a taking of its property.[7] This Court has repeatedly stated that not every government action affecting the value of property constitutes a taking. *Keystone Bituminous Coal Association v. DeBenedictis,* 107 S. Ct. 1232, 1244-45 (1987); *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 14 (1984); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978).

The established and controlling rule in this case is the rule set out by this Court in *Danforth v. United States,* 308 U.S. 271 (1939). In *Danforth,* this Court held that the adoption of specific plans for a public improvement by a governmental

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[6] This Court has repeatedly stated that issues of fact are for the conclusive determination of the State courts. *Wolfe v. State of North Carolina,* 364 U.S. 177, 196 (1960) and *Watts v. State of Indiana,* 338 U.S. 49, 50-51 (1949). The fact that the Minnesota Court of Appeals considered both the undisputed factual evidence presented at trial as well as the jury's conclusions concerning factual disputes is not a "special and important reason" for this Court to grant review.

[7] Fitger argues that the Minnesota Pollution Control Agency has contributed to this alleged taking by requiring Fitger to abate its pollution of Lake Superior. However, this Court has long recognized that there is no constitutional taking when a State acts to protect the public's interest in the environment by compelling private individuals to abate activities akin to a public nuisance. *Keystone Bituminous Coal Association v. DeBenedictis,* 107 S. Ct. 1232, 1243-44 (1987) and *Northwest Laundry v. City of DesMoines,* 239 U.S. 486, 491-92 (1916).

body does not constitute a taking even where the plans identified the property necessary for the project. This Court stated:

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

Id. at 285. The holding of *Danforth* was recently cited by this Court with approval in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In *Agins*, a regulatory taking case, this Court observed that the California Supreme Court acted properly in holding that good faith government planning activities in anticipation of adopting a zoning ordinance do not constitute a taking even when those activities adversely affect property values. *Id.* at 263 n.9.

The opinion of the Minnesota Court of Appeals clearly comports with this Court's holding in *Danforth*. The activities undertaken by the State were legitimate planning activities in response to local concerns and requirements of federal law. *Fitger Brewing Company v. State of Minnesota*, 416 N.W.2d 200, 204 (Minn. Ct. App. 1987). Fitger wanted and requested assurances from the State during the planning process that its property would be taken. The Court found that the State could not and did not give Fitger such assurances. *Id.* at 208. The Court concluded Fitger voluntarily chose to close its brewery rather than continue in operation and install pollution abatement equipment.[8] *Id.* Fitger puts forth no "special

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[8] Fitger claims that the State, by opposing its petition to the City of Duluth to vacate a valid street easement and by requesting it to oppose inclusion of its property in the National Register of Historic Places, affirmatively restricted development of its property. (Petition at 5.) The Minnesota Court of Appeals gave no particular weight to these claims, obviously concluding mere requests made by a government agency do not give rise to a restriction of property rights.

or important reasons" why this Court should re-examine its decision in *Danforth*.

Fitger ignores the dictates of this Court as set forth in *Danforth* and instead asserts that the Minnesota Court of Appeals erred in failing to focus on Fitger's purported injury pursuant to the line of cases issued by this Court governing regulation takings. Although the *Danforth* rule clearly controls in the present case, even if the regulatory taking analysis is applied to this case, the *Alevizos* rule as applied here by the Minnesota Court of Appeals is consistent with this Court's regulatory taking analysis. (Petition at 17.)

In regulatory taking cases this Court has consistently held that, absent a physical invasion of property, the constitution requires a balancing of the alleged injury to the landowner with the government's interest in the proper exercise of its police powers. *Id.; see also Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3146 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Contrary to the assertions made by Fitger, consideration of the government's goals, the importance of those goals, the legitimacy of those goals, and the method the government used to attain those goals are not only a part of the taking analysis but are essential components of that analysis. *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232, 1244-45 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-27 (1978). As Justice Holmes noted.

> Government hardly could go on if to some extent the values incident to property could not be diminished with-

> out paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); *see also Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984) (holding certain government intrusions of private property must be borne by private parties as an advantage of living in a progressive society).

Governmental planning activities are a legitimate exercise of the government's police powers. In *Berman v. Parker*, 348 U.S. 26 (1954), this Court recognized that the scope of government's police powers was broad enough to encompass the government's planning activities and concluded:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide the nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id. at 33.

The government's planning interests must be weighed against the burdens placed on landowners including: the uniqueness of the burden placed on the individual landowner as opposed to the burden suffered by the public at large; the nature of the government interference; the degree or extent of the invasion; the property use remaining to the landowner;

the rights invaded, and the owner's ability to continue to use its property. *See Nollan v. California Coastal Commission,* 107 S. Ct. 3141, 3145, 3150 (1987) (discussing burdens on landowner which should be considered in determining whether a taking has occurred); *Keystone Bituminous Coal Association v. DeBenedictis,* 107 S. Ct. 1232, 1242-43, 1248 (1987) (discussing possible burdens placed on an owner by the government's activities); *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 14-15 (1984) (discussing burdens placed on landowner pending future condemnation); *Agins v. City of Tiburon,* 447 U.S. 255, 260-62 (1980) (discussing kinds of burdens placed on a landowner by the government's activities); *Penn Central Transportation Company v. City of New York,* 438 U.S. 104, 134-37 (1978) (discussing restraints on development as a burden imposed on property by the City's activities); *Armstrong v. United States,* 364 U.S. 40, 49 (1960) (discussing burdens placed on landowner as a result of the government's activities). The Minnesota Court of Appeals properly applied this type of analysis to the facts of this case.

The Minnesota Court of Appeals applied the *Alevizos* standard which requires proof of a " 'direct and substantial invasion' " of property rights of such a magnitude as to deprive an owner of the practical enjoyment of his property resulting " 'in a definite and measurable diminution of the market value of the property.' " *Fitger Brewing Co. v. State of Minnesota,* 416 N.W.2d 200, 205 (Minn Ct. App. 1987) (quoting *Alevizos v. Metropolitan Airports Commission,* 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974)). The *Alevizos* standard recognizes the importance of injury to the petitioner. Fitger does not directly contest the constitutional validity of the *Alevizos* standard. Rather, Fitger claims that the Appellate Court's conclusions after applying the standard are merely incorrect.

However, the Minnesota Court of Appeals considered the effect of the purported government intrusions in reaching its decision and concluded that there had been no taking of Fitger's property. The finding of the Minnesota Court of Appeals is not inconsistent with the dictates of this Court or the U.S. Constitution and does not merit this Court's attention.

II. THIS IS NOT AN APPROPRIATE CASE TO RESOLVE AN ALLEGED CONFLICT BETWEEN THE JURISDICTIONS CONCERNING WHETHER GOVERNMENT PLANNING ACTIVITIES CAN EVER GIVE RISE TO A CONSTITUTIONAL TAKING.

Fitger argues that this Court should accept review to settle a conflict among the jurisdictions regarding whether a decline in a property's land value caused by the plotting and planning of a public improvement constitutes a taking. (Petition at 19.) The commonly accepted rule throughout the country is that mere plotting and planning of a public improvement project in anticipation of a taking does not result in a taking. *See Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied* 444 U.S. 899 (1979); *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 820 (Minn. 1984); *Lone Star Industries v. Secretary of Kansas Department of Transportation*, 234 Kan. 121, 127, 671 P.2d 511, 516-17 (1983); *Jones v. People ex rel. Department of Transportation*, 22 Cal. 3d 144, 151-52, 583 P.2d 165, 169, 148 Cal. Rptr. 640, 644-45 (1978). Several of those jurisdictions that have adopted the general rule have relied on this Court's reasoning in *Danforth* to reach the conclusion that planning does not give rise to a taking. *See Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied* 444 U.S. 899 (1979);

Howell Plaza, Inc. v. State Highway Commission, 92 Wis. 2d 74, 82-83, 284 N.W.2d 887, 891 (Wis. 1979); *City of Buffalo v. J. W. Clement Company*, 28 N.Y.2d 241, 255, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 357 (1971). There are, however, a few jurisdictions which have held that plotting, planning, and other activities in anticipation of a taking may constitute a taking when the government's actions result in such a direct, substantial, and peculiar interference with a property interest that the owner's property value is diminished. *See Richmond Elks Hall Association v. Richmond Development Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977); *Roth v. State Highway Commission of Missouri*, 688 S.W.2d 775, 777-78 (Mo. Ct. App. 1984); *Conroy-Prugh Glass Co. v. Commonwealth of Pennsylvania Department of Transportation*, 456 Pa. 384, 388 A.2d 598, 602 (1974).

Although there would appear to be a difference between those jurisdictions following the general rule and those few states going beyond that rule, this case is not an appropriate vehicle for resolution of that dispute. Fitger claims that this case would have different results depending on the state or federal circuit in which it was brought. There is no basis for this claim.

The Minnesota Court of Appeals noted the majority general rule recognized by the Minnesota Supreme Court in *Spaeth*. However, the Court of Appeals then went on to apply the taking analysis set out in *Alevizos*. The *Alevizos* analysis required the Court to determine whether the State's planning activities resulted in a direct and substantial invasion of property to such a magnitude that Fitger was deprived of the practical enjoyment of its property and to determine whether the invasion resulted in a definite diminution of the property's market value. *Fitger Brewing Co. v. State of Minnesota*,

416 N.W.2d 200, 205 (Minn Ct. App. 1987) (quoting *Alevizos v. Metropolitan Airports Commission of Minneapolis*, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974)). The Court, after applying the *Alevizos* standard, found there had not been a taking. The *Alevizos* standard is substantially similar to the analysis followed in the more stringent jurisdictions. There is no reason to believe that those jurisdictions, using a substantially similar standard, would reach a different conclusion in this case.

Fitger cites nine taking cases from eight jurisdictions in support of its position that this case would have been treated differently in another jurisdiction. However, in each of those cases the governmental agency's actions went beyond the types of plotting and planning activities undertaken by the State of Minnesota in the present case.[9] Based on these cases,

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[9] *See Richmond Elks Hall Association v. Richmond Development Agency*, 561 F.2d 1327 (9th Cir. 1977) (taking found where government planned the project, adopted a four year acquisition plan including the subject property, commenced condemnation actions, entered into an agreement with a private developer to implement development of the area including the subject property, acquired 83 percent of all property needed for the development, and only then decided not to acquire the subject property); *Ventures in Property I v. City of Wichita*, 225 Kan 698, 594 P.2d 671 (1979) (taking found where city would restrict development of property inside a proposed highway corridor at State request in order to reduce the property value for future acquisition); *Jones v. People ex rel. Department of Transportation*, 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978) (taking found where, due to planned freeway construction, city closed certain roads accessing the subject property, refused to approve owner's subdivision plans, postponed acquisition of the subject property and where State had acquired some property and had made the owner of the subject property and offer); *Washington Market Enterprises Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975) (taking found where city terminated a redevelopment project after it had adopted a redevelopment plan including the subject property, designated subject property as blighted, authorized acquisition,

none of the eight jurisdictions would find that the types of planning activities undertaken by the State of Minnesota constitute a taking.

To the contrary, in two of the jurisdictions relied upon by petitioner, Kansas and California, the state supreme courts have held that planning activities of the kind undertaken by the State of Minnesota do not give rise to a taking. *See Lone Star Industries Inc. v. Secretary of Kansas Department of Transportation*, 234 Kan. 121, 671 P.2d 511 (1983) (holding no taking as a result of the State's announced intent to acquire property for highway construction even though the acquisition

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and acquired a vast majority of properties surrounding the subject); *Petition of Cornell Industrial Electric Inc.*, 19 Pa. Commw. 599, 338 A.2d 752 (1975) (taking found where government delayed a scheduled property acquisition after all government plans had been approved, government had begun condemnation, but government had delayed acquisition of petitioner's property to a later date); *Textron, Inc. v. Wood*, 167 Conn. 334, 355 A.2d 307 (1974) (taking found where State had informed owner that it might acquire the property, had appraised the property, had initiated negotiations with the owner, had told owner the property was needed by a date certain, and had advertised construction bids for the project); *Conroy-Prugh Glass Co. v. Commonwealth of Pennsylvania Department of Transportation*, 456 Pa. 384, 321 A.2d 598 (1974) (taking found where subject property abutted an in-place bridge and which would be used in every conceivable highway construction plan); *Roth v. State Highway Commission of Missouri*, 688 S.W.2d 775 (Mo. Ct. App. 1984) (taking found where the State asked the city to halt the owner's property development in 1969, State made the owner direct purchase offers from 1971 through 1974 which were rejected but the State did not institute condemnation procedures until 1976); and *In re Virginia Park v. City of Detroit*, 121 Mich. App. 153, 328 N.W.2d 602 (1982) (taking found where city commenced urban renewal project, sent notice to owner's tenants in 1973 that it would be condemning the property, tenants moved out, and city delayed condemnation procedures until 1979).

was discussed with the owner but the scope of the taking was unknown); *Selby Realty Company v. City of Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal Rptr. 779 (1973) (holding mere adoption of an avenue area plan showing possible taking of subject property was not a taking). Both the California and Kansas Supreme Courts stated that if they were to label preliminary planning activities, such as those undertaken by the State of Minnesota, as a taking, government planning of public improvement projects would grind to a halt. *See id.* at 120-21, 514 P.2d at 117, 109 Cal Rptr. at 805-06; *Lone Star*, 671 P.2d at 517.

On September 30, 1972, when Fitger closed its brewery, the State of Minnesota had done nothing more than plan a public improvement project and attempt to abate pollution of Lake Superior. The State had not adopted or approved a plan or design for I-35. In fact, the State's consultant was actively considering twenty-five separate alignments of which only some would utilize the brewery property. The State had not initiated acquisition activities; had not made offers, acquired properties, or made appraisals; and had not adopted a right-of-way plan. The decision in this case would have been the same regardless of the jurisdiction in which it arose.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Petitioner Fitger Brewing Company should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 87-1903

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FITGER BREWING COMPANY,
a Minnesota corporation,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

The Petition in this case requests review of the Minnesota Court of Appeals' decision holding that no taking of the Fitger Brewing Company's ("Fitger") property occurred despite unchallenged jury findings that Fitger reasonably relied on State Highway Department representations that all plans for construction of the freeway required acquisition of all or a part of the brewery property, and that it would therefore be impractical for Fitger to install pollution abatement improvements in compliance with a State Pollu-

tion Control Agency directive that required such improvements for continued operation of the brewery; and that the State's conduct restricted Fitger in improving, developing, utilizing, or otherwise disposing of its property for over 13 years.

Although the Petition adequately states the reasons justifying the grant of a writ, we believe a brief reply is necessary to correct several assertions in Respondent's Brief in Opposition and to address Respondent's arguments in opposition to the Petition.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's Statement of the Case attempts to revive factual disputes that were resolved by the jury, whose specific factual findings have gone unchallenged.[1] Despite all of Respondent's contentions, the jury found that prior to closing down on September 30, 1972, Fitger reasonably relied on Respondent's representations that all of its plans for construction of the freeway required the acquisition of all or a part of Fitger's property. The jury obviously rejected Respondent's contentions of the uncertainty of the plans and Respondent's eleventh hour disclaimer that there was a "possibility" that the freeway project would not go forward or that a new, as yet unthought of, alignment could be subsequently adopted.[2]

Petitioner is also confused by several apparent erroneous references to the record by Respondent. For example, on page 4 of its Brief in Opposition, Respondent cites Trial Court Exhibit 8 in support of the factual proposition that

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[1]The jury's Answers to the Trial Court's Special Interrogatories are set forth in Appendix 1 to this Reply Brief.

[2]Indeed, the mere *possibility* of a change in plans for or abandonment of a governmental project exists for virtually every such project.

Fitger did not have sufficient working capital to install pollution abatement equipment. However, that trial exhibit (Appendix 2 to this Reply Brief) was a letter from the Minnesota Pollution Control Agency ("PCA") to Fitger reminding it of the need for certain progress reports, and has absolutely nothing to do with Fitger's financial situation. On the same page of its Brief in Opposition, Respondent cites Trial Court Exhibit 24 as support for the proposition that Fitger "volunteered to either abate pollution or terminate operations on September 30, 1972." As a review of that trial exhibt (Appendix 3 to this Reply Brief) demonstrates, that exhibit is a letter from Respondent's Highway Department to the Executive Director of the PCA requesting favorable consideration to Fitger's request for additional time to comply with the PCA's pollution abatement requirements, and does not in any way support the proposition for which it is cited.

Respondent also asserts in footnote 4 on page 6 of its Brief in Opposition that claims relative to the rail access are being raised for the first time in the Petition. However, the following was asserted in Fitger's Amended Complaint:

> 15. That the rail access to Fitger's property was essential to Fitger's brewing operation such that the acquisition of the railroad access would effectively destroy Fitger's brewing business.
>
> 16. That the State of Minnesota has wrongfully omitted Fitger's property from its eminent domain proceedings for the condemnation of only the rail access to Fitger's property.

Amended Complaint, paragraphs 15 and 16 (Appendix G to Petition, at p. A-40). Respondent also contends that there

was no evidence at the trial concerning the taking of the rail access. On the contrary, the record demonstrates that Fitger President John Ferris testified about the brewery's use of the rail access and the impact of the taking of that rail access on the brewery. Trial Court Transcript, p. 350, ln. 13 to p. 353, ln. 7; p. 376, ln. 2 to p. 377, ln. 2. (Copies of these portions of the Transcript are attached as Appendix 4 to this Reply Brief).

REPLY TO RESPONDENT'S LEGAL ARGUMENTS

Respondent relies on the case of *Danforth v. United States,* 308 U.S. 271 (1939), for the proposition that mere planning of a public improvement by a governmental entity does not constitute a taking. However, as pointed out in the Petition, the issue raised by this case is what amount of conduct *beyond* mere planning gives rise to a taking under the Fifth Amendment. Moreover, in *Danforth,* the dispute was over the determination of the time of the taking in a condemnation action under the Flood Control Act for the purpose of computing interest on the condemnation award. The Court determined that the time of the taking in such a condemnation action was the date of the condemnation award. *Danforth's* applicability to an inverse condemnation case such as the case at bar is extremely tenuous, and thus, that case is of no determinative value in addressing the issues in this case.

Respondent attempts to defend the Minnesota Court of Appeals' decision in this case by contending that the Court of Appeals applied a constitutionally legitimate standard first expressed in the Minnesota Supreme Court case of *Alevizos v. Metropolitan Airport Commission,* 298 Minn. 471, 216 N.W.2d 651 (1974). A careful review of the

Minnesota Court of Appeals' opinion, *Fitger v. State*, 416 N.W.2d 200 (Minn. App. 1987) (Petition, Appendix A), reveals that the Court of Appeals' only expression of the *Alevizos* standard was its quotation in the beginning of the opinion's analysis. 416 N.W.2d at 205 (Petition Appendix A, at A-12). Mere lip service to a purported constitutional standard, however, does not qualify as an application of the standard.

The standard actually applied by the Minnesota Court of Appeals was, as noted in the Petition, attributed to the case of *Orfield v. Housing & Redevelopment Authority of St. Paul*, 305 Minn. 336, 232 N.W.2d 923 (1975),[3] as follows:

> Thus, under *Orfield*, the question is whether the State has abused its power of eminent domain.

416 N.W.2d at 207-208 (Petition Appendix A at A-18).

Respondent lists several considerations that must be examined by a court in a case such as this. Respondent's Brief at 12-13. None of those considerations were addressed by the Minnesota Court of Appeals. For example, one such consideration is the uniqueness of the burden placed on the individual landowner as opposed to the burden suffered by the public at large. The Court of Appeals failed to consider that no other property owner in the same vicinity of the planned freeway alignment was subject to a forced closure of its operations by the PCA in the absence of pollution abatement, nor dependent on the railway access that would be severed by the freeway for the continued opera-

[3]It is particularly noteworthy that in *Orfield*, the Minnesota Supreme Court expressly concluded that *Alevizos* was inapplicable to *Orfield's* facts. 305 Minn. at 340, 232 N.W.2d at 926.

tions of the highest and best use of its property, as Fitger was.

In light of the foregoing, Petitioner submits that Respondent's basis for upholding the Minnesota Court of Appeals' decision is completely unfounded and without merit.

CONCLUSION

For the foregoing reasons, as well as those that have been urged in the Petition, certiorari should be granted. Without intending to diminish the need for plenary review of this case, Petitioner alternatively suggests that in light of the Minnesota Court of Appeals' clear failure to apply the Fifth Amendment standards established by this Court, summary reversal is in order, or, in the alternative, a grant of the Petition, vacation of the Minnesota Court of Appeals' decision, and a remand for proper consideration in light of this Court's precedents.

Respectfully submitted,

/s/ Richard J. Leighton*
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APPENDIX

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APPENDIX 1

STATE OF MINNESOTA — DISTRICT COURT
County of St. Louis — Sixth Judicial District

Fitger Brewing Company, a Minnesota Corporation,
Plaintiff,

vs.

State of Minnesota,
Defendant.

SPECIAL INTERROGATORIES
File No. 1423999

1. Prior to closing down on September 30, 1972, did the Fitger Brewing Company reasonably rely on the representations of the State, through its Highway Department and its employees, that all of the plans for the construction of Interstate 35 required the acquisition of all or a part of Fitger's property? Yes.

2. Before September 30, 1972, was Fitger's business adversely affected as a result of public announcements and other publicity, generated by the State that the route for Interstate 35 would require the taking of Fitger's property? Yes.

3. Did Fitger's reasonably rely on the State's representation that it would be impractical for Fitger's to install pollution abatement facilities because all of the State's I-35 plans would require the acquisition of some or all of Fitger's property? Yes.

4. Prior to closure on September 30, 1972, did the State misrepresent to Fitger Brewing Company that Federal Regulations governing the State did not permit it to "make an acquisition or indeed begin the process until the final alignment of the highway was determined? Yes.

If your answer to question 4 is "yes", then answer question 5.

5. Did the Fitger Brewing Company reasonably rely on that misrepresentation in its corporate planning? Yes.

6. Did the State by its acts or conduct restrict Fitger Brewing Company in improving, developing, utilizing, or otherwise disposing of its property between the date of its public announcement in November 1970 and December 1983, when the property was sold? Yes.

7. What was the fair market value of the Fitger Brewing Company brewery property on September 30, 1972?

$1,250,000.00.

8. What amount will reasonably compensate the Fitger Brewing Company for all of the necessary expenses it incurred to maintain its property from September 30, 1972 until the property was sold on December 19, 1983?

$812,797.

Foreperson

Jurors concurring sign here.

1. Christine A. Spehar
2. Janice Krueger
3. Pamela A. Miller
4. Nancy Poferl
5. George Davis, Jr.

Jurors Concurring

Dated at Duluth, Minnesota, this 19th day of November A.D., 1986.

This verdict was agreed to at the hour of 4 o'clock P.M.

After six hours of deliberation five jurors may agree upon and return a verdict. When the verdict is agreed to by five jurors only (after six hours deliberation) all the jurors who agree to the verdict should sign the same and the time of agreement should be noted.

APPENDIX 2

STATE OF MINNESOTA
POLLUTION CONTROL AGENCY
717 Delaware Street S.E.
(Oak and Delaware Streets S.E.)
Minneapolis, Minnesota
55440
September 5, 1969

Mr. John C. Beerhalter, President
Fitger Brewing Company
600 East Superior Street
Duluth, Minnesota 55802

Dear Mr. Beerhalter:

This is to remind you that Interstate Water Quality Standards (WPC-15) requires the regular submission of quarterly reports on progress toward construction of necessary improvements to waste disposal facilities discharging to interstate waters, and monthly reports on the operation and effluent quality. Our records indicate these reports have not been provided.

A review of our file indicates you are seriously delinquent in meeting the recommended schedule for construction of industrial waste treatment facilities or diversion of wastes to the municipal sanitary sewer system.

You should be aware that this office intends to use all available resources to obtain compliance with State pollution control laws and regulations.

If you wish arrangements can be made for a meeting in this office at a mutually convenient time to attempt to resolve any existing problems which may be preventing sub-

mission of quarterly and monthly reports and/or impeding progress toward construction of adequate waste disposal facilities.

It is expected that quarterly progress reports on the status of this project and monthly operation reports will be summitted promptly and regularly or that you will make necessary arrangements to meet with our staff within thirty days.

Yours very truly,

/s/ R. D. Miller, Acting Chief
Section of Enforcement

RDM/RWK:ms

cc: Honorable Ben Boo, Mayor
City Council of Duluth, c/o Mr. A. Howard Wold, Clerk.

Trial Court Exhibit No. 8

APPENDIX 3

STATE OF MINNESOTA
Department of Highways
St. Paul, Minn. 55101

July 7, 1971

cc:
R. Lappegaard
L. H. Miller
J. A. Ferris

Grant Merritt
Executive Director
Minnesota Polution Control Agency
717 Delaware Street S.E.
Minneapolis, Minnesota 55440

Dear Mr. Merritt:

Under date of July 6, 1971, Mr. J. A. Ferris, President, Fitger Brewing Company, Duluth, wrote you concerning problems his firm has which are aggravated by pending decisions concerned with the location of Federal Interstate Route 35 in Duluth.

Commissioner of Highways Ray Lappegaard is at this time processing a contract with the firm Eckbo, Dean, Austin and Williams to study and make recommendations for solutions to this highway location problem. This study should require 32 weeks for completion. This study which has the cooperation of the City of Duluth and environmental groups in Duluth will consider all aspects of transportation corridors from the evaluation of existing data, community involvement through environmental considerations.

It is during this 32 weeks that Fitgers future at its present location is uncertain.

For these reasons, we would ask favorable consideration to its request for an extension of time.

Sincerely,

/s/ C. E. Burrill

Assistant Commissioner —

Transportation & Transit

Planning & Programming

CEB:KII

Trial Court Exhibit No. 24

APPENDIX 4

November 3, 86 Ferris

* * * *

[350] Q. Operating, pardon me. Operating expense went down? Now, in 1969 then, and the subsequent three years, including 1969, that includes the three years? In any event, that time that you were with the brewery, how did you take deliveries physically of your materials and supplies? A. The grain haul came over the railroad tracks that led into the back of the brewery. That has since been cut off.

Q. The grain came in — A. By railroad.

Q. How was that unloaded? A. We had — they came on hopper cars. We had a fitting we put on the bottom of the hopper and it was sucked up by vacuum to the fifth floor and then fed down by gravity.

[351] Q. How many shipments of grain would you require in a year to produce the 25 and less thousand barrels per year? Do you remember that? A. Eight or nine.

Q. Per year? A. Yes.

Q. Was that at the peak? A. I am just talking about bushels of malt. There was also corn grits. There were separate bins for those. So, it would probably figure — I don't know what the ratio was additional for corn.

Q. Okay. Are you saying then in fiscal year 1969 that there had been eight separate train movements moving grain cars in and out of the brewery area? A. Yes, they switched them on brewery property and come in with several car loads for different destinations — switch them and put them in and they had to come in at night because of the cars parked on Michigan Street.

Q. By that you mean that they were blocking the tracks — these cars? A. Yes.

Q. And what else was delivered by train besides the grain? A. Bottles on occasion. We had — periodically you would have to replace bottles that were lost or not returned to the brewery. Most of our cases came in by truck. [352] Q. What do you mean by that? A. Cases for putting the bottles — or the cans.

Q. So those were cardboard or paper, I take it?

A. Yes.

Q. How about the bottle caps and labels? A. That came in by — those came in by trucks or vehicles. They weren't nearly as bulky and might be just a quarter of a truck load in some cases.

Q. And how about the bottles? Did they sometimes come by truck as well? A. They were delivered back to the plant by truck but when we replaced bottles that had been broken or not returned they came by train as a rule, or box car.

Q. When you say as a rule, I take it occassionally you did purchase bottles and they were brought in? A. Simply, yes.

Q. Okay. And what railroad line was that again?

A. That was — used to be the tracks down there in Northern Pacific but that is Burlington Northern now.

Q. So, was it Burlington or was that the railroad that you dealt with and did business with? A. Part of the time. I don't know when the merger took place but it didn't make any difference in our operation.

Q. Right, but whatever the railroad was called, it was always the same railroad except —

[353] A. Same tracks.

Q. Over a period of time there were several — three railroads that merged, I believe, and formed the present Burlington Northern? A. That's right.

Q. So, that's the railroad that we're talking about?

A. Yes.

* * * *

[376] Q. I'm going to ask you that question one more time. There were two plans considered by the advisory committee? A. Yes.

Q. Were they designated by letter? A. Yes.

Q. What were those letters? A. Plan D and Plan E.

Q. One of those plans would have affected the Fitgers Brewery, would it not? A. Yes.

Q. And the other plan would not have affected the Fitger's brewery? Is that correct? A. No.

Q. By no you mean it would not have affected — A. No, it would affect the Fitgers Brewing Company, both plans.

Q. How would Plan E have affected the Fitgers brewery? A. Plan E which is the existing construction now, would have cut off our railroad access as it did.

Q. Would it have taken any of the buildings?

A. No, it wouldn't have touched our land but it would have cut off the railroad servicing the plant.

Q. It would not have touched the buildings or land at all? A. No, but it would have affected the plant.

[377] Q. That's the way the highway is being built today? A. Yes.

* * * *